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CAPTION.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

Record of proceedings of the United States District Court within and for the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 25th day of November, 1949 and proceeded to final disposition on the 27th day of October 1950, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: THE HONORABLE PAUL JONES,
United States District Judge.

In the Matter of the Petition of the CANADA STEAMSHIP LINES, LIMITED, for Exoneration from or Limitation of its Liability.	ADMIRALTY No. 3508.

SPECIAL APPEARANCE OF PARTIES NAMED HEREIN ON EXCEPTIONS TO THE JURISDICTION OVER THEIR PERSONS.

(Filed August 15, 1950.)

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio:

Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, appear specially herein for the sole purpose of filing their peremptory exceptions to the petition of Canada Steamship Lines, Ltd. and to the orders and monitions of this Court issued thereunder, dated November 30, 1949 and June 7 and June 8, 1950.

Said parties except to said petition and to said proceedings had hereunder in this cause under favor of Admiralty Rule 34 of this Court and upon the grounds hereinafter set forth.

In support of said exceptions, said parties respectfully allege as follows:

I.

They and each of them have valid claims for damages against Canada Steamship Lines, Ltd. arising from the loss and destruction of the Steamship Noronic by fire, at Toronto, Ontario, Canada, on September 17, 1949. As such claimants, they are among the persons mentioned in said petition of Canada Steamship Lines, Ltd., and in the orders and monitions issued by this Court in this cause above stated.

II.

They except to said petition and to the order and monition dated November 30, 1949, and to the proceedings had thereunder upon the ground that petitioner Canada Steamship Lines, Ltd. has failed to comply with the mandatory requirements of United States Admiralty Rule 51 as amended on June 21, 1948, in the following respects:

1. The said monition issued by the Court in this cause requires that notice of the proceeding be published once

each week until the return date of the said monition. Said parties say that the second publication of said notice was made on December 12, 1949, in the newspapers named in said monition. Petitioner did not theretofore nor on that day mail a copy of said notice to any of the persons or personal representatives herein named *although petitioner knew that said persons and each of them* had a claim against the vessel and the petitioner arising out of the voyage on which the claims sought by petitioner to be exonerated or limited arose. Nor did petitioner in respect to cases involving death, theretofore, nor on that day, mail a copy of said notice nor a copy of said Rule 52 as amended to the decedents at their respective last known places of address, nor to any of the persons known to the petitioner to have made a claim on account of such decedents, as required by said Rule 51.

2. Petitioner failed to give by publication due and lawful notice as required by said Rule 51, in that the purported notice published in said newspapers was not substantially in accordance with the form required by said Rule 51 in the following particulars:

(a) Said notice omitted in its caption the following: "Notice of petition for exoneration from or limitation of liability. Filed ....."

(b) Said notice failed to include the following requisite statement: "Pursuant to Title 46, U. S. Code, Sections 183-189, claiming the right to * * *"

(c) Said notice omitted the following: "* * * under oath as provided in United States Supreme Court, Admiralty Rule 52, with the Clerk of this Court at the U. S. Court House at Cleveland, Ohio."

(d) Said notice failed to give the following instruction: "* * * as required by Supreme Court Admiralty Rule 53 and serve on or mail to petitioner's proctors a copy."

3. Petitioner did not mail a copy of any notice to every person known by petitioner to have made a claim against the vessel or petitioner arising out of the voyage or trip on which the claims sought to be limited arose.

4. Petitioner did not, in cases involving death, send a copy of any notice together with a copy of Rule 52 by mail

to decedents at their respective last known addresses, nor did it send any notice by mail or otherwise to persons known to petitioner to have made claims on account of such deaths prior to June 28, 1950.

III.

They except to said petition and to the order and monition dated June 8, 1950, and the order contained in the Memorandum Opinion of June 7, 1950, and to the proceedings had thereunder upon the ground that petitioner Canada Steamship Lines, Ltd. has failed to comply with the mandatory requirements of United States Supreme Court Admiralty Rule 51 as amended on June 21, 1948, and has failed to comply with the directions of Title 46, Section 185, in the following respects:

1. They reallege all the reasons and grounds set forth in the exceptions raised to the order and monition dated November 30, 1949, in Subdivision II hereof.

2. The first monition expired April 3, 1950, and no application was made nor order entered prior to said expiration or for more than one month thereafter, keeping said writ and process of monition dated November 30, 1949, in force and effect.

3. At the time of the issuance of the monition and order of June 8, 1950, no jurisdiction over the persons of these exceptors had been had and they had neither been served personally nor had any legal notice been mailed to them nor had any copy of Rule 52 Admiralty Rules been mailed to any of them by Canada Steamship Lines, Ltd., and no valid process was in existence.

4. At the time of issuance of the order and monition of June 8, 1950, more than six months had elapsed since the first written notice of claim had been given to or filed with petitioner, Canada Steamship Lines, Ltd.

These exceptions are based upon the files and records of this Court and the affidavits hereto attached and by reference made a part hereof and the affidavits of Ethel Dahlke, V. E. Metzler, Cora D. Sheron, Marion E. Dexter, Elmer H. Groefsema, Lucille Orth, Madge Bishop, Pearle T. Coleman, Eleanor A. Handloser, Pearl Oakes, C. Audley Gray, Verena Gray, and Charles Haas.

WHEREFORE, said parties, appearing specially as aforesaid, jointly and severally pray for the following relief for themselves:

1. That their said exceptions be sustained by the Court.

2. That the petition for exoneration or to limit liability be dismissed as to them at petitioner's costs.

3. That the order and monition of this court dated November 30, 1949, be held to be void and of no effect as to them.

4. That the order and monition of this court dated June 7 and June 8, 1950, be held to be void and of no effect as to them.

5. That all attempted service of process by publication be held to be void and of no effect as to them.

6. That all attempted service of process by mail be held to be void and of no effect as to them.

J. D. GUERNSEY,

Proctor for Excepting Claimants Howard H. Timanus, Administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, deceased,

Fostoria, Ohio,

and

KENNETH C. DAVIES,
W. ALEXANDER ELDRIDGE,
ELMER H. GROEFSEMA,
VICTOR M. TODIA,
J. HAROLD TRAVERSE,

738 Union Commerce Building,
Cleveland 14, Ohio,
MAin 1-1859,

Proctors for Excepting Claimants.

(Brief omitted.)

AFFIDAVIT OF HOWARD H. TIMANUS, ADMINISTRATOR OF THE ESTATES OF JAMES K. TIMANUS AND DOROTHY COLEMAN TIMANUS.

STATE OF OHIO,
SENECA COUNTY, SS.

Howard H. Timanus, being first duly sworn, says and avers that he is the duly appointed, qualified and acting administrator of the estate of James K. Timanus and the administrator of the estate of Dorothy Coleman Timanus, having been appointed as such by the Probate Court of Seneca County, Ohio, on the 5th day of October, 1949.

That James K. Timanus and Dorothy Coleman Timanus, his wife, were on the 17th day of September, 1949, and for a long time prior thereto, were residents of the City of Fostoria, Seneca County, Ohio, and that their mailing address was 1044 North Union Street, Fostoria, Ohio.

That from and after the 17th day of September, 1949, and until the date of this affidavit, the deponent took charge of the receipt of all mail addressed to either James K. Timanus or Dorothy Coleman Timanus, or both, at their residence above stated.

That James K. Timanus and Dorothy Coleman Timanus were both passengers on the vessel Noronic at the time of its destruction by fire at the Port of Toronto, Ontario, Canada, on the 17th day of September, 1949, and that both James K. Timanus and Dorothy Coleman Timanus perished on said vessel as a consequence of the fire.

Affiant believes and therefore alleges the fact to be that at the time shortly prior to said disaster, said James K. Timanus and Dorothy Coleman Timanus became passengers aboard said vessel, they furnished their names and address to the Canada Steamship Lines Limited, said address being 2238 Carabel Avenue, Lakewood, Ohio, where said James K. Timanus and Dorothy Coleman Timanus, temporarily resided by reason of Dr. James K. Timanus internship in a Cleveland Hospital, that affiant since the 17th day of September, 1949, took charge of the receipt of all mail addressed to either James K. Timanus or Dorothy Coleman at said Cleveland address.

Affiant believes and therefore alleges the fact to be that on the 17th day of September, 1949, and that at all

times subsequent thereto, the Canada Steamship Lines, Limited was in possession of the passenger list containing the names and addresses of the passengers aboard said vessel Noronic at the time of said disaster, and that the name of James K. Timanus and Dorothy Coleman Timanus and their address at number 2238 Carabel Avenue, Lakewood, Ohio, were on said passenger list.

Affiant further says that at no time since said disaster on the 17th day of September, 1949, until the 28th day of June, 1950, did the petitioner, Canada Steamship Lines, Limited, mail any notice to either James K. Timanus or Dorothy Coleman Timanus nor to deponent of the filing of the petition for exoneration from or limitation of liability in this cause; that at no time since the 17th of September, 1949, until the 28th day of June, 1950, was a copy of Rule 52 of the United States Supreme Court Admiralty Rules of Practice mailed to either James K. Timanus, Dorothy Coleman Timanus or deponent, although petitioner knew that a claim on account of the death of the said James K. Timanus and Dorothy Coleman Timanus existed and had arisen by reason of the said fire on said vessel and that no such notice or rule was mailed by said Canada Steamship Lines, Limited, to either James K. Timanus or Dorothy Coleman Timanus, at either address hereinabove set forth, until after June 28th, 1950.

Affiant further says that he believes and therefore alleges the fact to be that on the 21st day of September, 1949, Canada Steamship Lines, Limited, owners of said vessel, received a written notice of claim from C. Audley Gray and Verena Gray, for personal injuries sustained by said persons, both of whom were passengers on said vessel at the time of said disaster on the 17th day of September, 1949, and had claims by reason thereof against the Canada Steamship Lines Limited, as appears by the affidavit of said parties heretofore filed in this cause.

And further deponent saith not.

HOWARD H. TIMANUS.

(Jurat omitted.)

ORDER OVERRULING EXCEPTIONS.

(Entered October 27, 1950 by Paul Jones, Judge.)

Upon consideration of exceptions filed on August 15, 1950, by prospective claimants appearing specially herein, it is hereby

ORDERED that the same be and they are hereby overruled with exceptions to said objecting prospective claimants.

JONES,
U. S. District Judge.

Dated 10/27/50

PROSPECTIVE CLAIMANTS' SPECIAL APPEARANCE AND NOTICE OF APPEAL.

(Filed November 14, 1950.)

Please take notice that Howard H. Timanus, administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, administrator of the estate of Dorothy Coleman Timanus, deceased, appearing specially herein for the purpose of this appeal and for no other purpose, hereby appeal to the United States Court of Appeals for the Sixth Circuit from each and every Finding of Fact and Conclusion of Law included in the following:

(a) Memorandum Opinion of the Court filed June 7, 1950;

(b) Order of the Court filed June 8, 1950, on exceptions of prospective claimants appearing specially herein;

(c) Order of the Court for second monition and injunction filed June 8, 1950;

(d) Order of the Court filed October 27, 1950, overruling exceptions of prospective claimants appearing specially.

Said prospective claimants submit herewith a copy of their petition for appeal and assignment of errors.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Claimants.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

PETITION FOR APPEAL IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY.

(Filed November 14, 1950.)

Now come the prospective claimants appearing specially herein as set forth in the Notice of Appeal, by R. C. Guernsey and J. D. Guernsey, their Proctors, and feeling themselves aggrieved by the Orders of this Court entered in the above entitled proceeding on the 7th, and 8th days of June, 1950, and on the 27th of October, 1950, do hereby claim an appeal to the United States Court of Appeals for the Sixth Circuit, from said Orders and from each and every part thereof.

Said prospective claimants appearing specially herein present herewith their assignment of errors and respectfully pray that said appeal may be allowed; that this cause may be certified to the United States Court of Appeals for the Sixth Circuit; that this Court will fix the amount of the appeal bond therefor and will allow for the making up and completion of the record in said cause within forty (40) days from the allowance of this appeal, or such further time as may become necessary.

HOWARD H. TIMANUS,
Administrator of the Estate of James K. Timanus, Deceased.

HOWARD H. TIMANUS,
Administrator of the Estate of Dorothy Coleman Timanus, Deceased.

Notice of Citation of Appeal waived.

LUCIAN Y. RAY,
One of Proctors for Petitioners.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Appealing Claimant.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

Dated November 13th, 1950.

ASSIGNMENT OF ERRORS IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY HEREIN.

(Filed November 14, 1950.)

Now come Howard H. Timanus, administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, administrator of the Estate of Dorothy Coleman Timanus, deceased, prospective claimants appearing specially herein, by R. C. Guernsey, and J. D. Guernsey, their Proctors, and hereby assign error to the orders of this Court filed on the 7th and 8th days of June, 1950 and the 27th day of October, 1950, including the Findings of Fact and Conclusions of Law contained therein, and to all proceedings theretofore had, in the following particulars:

(1) That the Court erred in holding that the mere filing of the petition and bond within the six month period provided for by 46 U. S. C., Sec. 185, following the receipt of the first written notice of claim, gave the Court jurisdiction, without any process whatever, not only of the res, but over the persons of prospective claimants, to fully determine their rights as against Canada Steamship Lines, Limited, and to finally enjoin them from bringing suits in forums of their own choice with a right of trial by jury and in holding that the inchoate jurisdiction over the persons of prospective claimants was not defeated by the admitted failure to comply with the requirements of U. S. Supreme Court Admiralty Rule 51.

(2) That the Court erred in granting on June 7th, 1950 and on June 8, 1950, petitioner's oral application of May 15th, 1950, for a second monition and order of publication and authority to mail notices, predicated upon a petition for limitation of liability in a forum concursus filed on November 25th, 1949, where the six months period provided for by 46 U. S. C. Sec. 185, during which limitation of liability proceedings could be brought in a forum concursus expired March 19, 1950, and where the return date on the original monition expired April 3rd, 1950, and it further erred in holding that jurisdiction over the persons of the excepting prospective claimants could be acquired by such second monition, publication and notice thereof.

(3) That the Court erred in holding that Admiralty Rule 51 could be complied with by the issuance of a second

monition, publication and mailing eight months after the petition and bond had been filed, notwithstanding the requirements of Admiralty Rule 51, which expressly provides that:

> "*Upon* the filing (of the bond) * * * the Court *shall* issue a monition, * * *
>
> "Notice of the monition *shall* be published * * * once in each week for four successive weeks *before the return date of the monition.*
>
> "The petitioner *not later than the day of second publication* (in this case, December 12, 1949) *shall* also mail a copy of the above notice to every person known to have made any claim against the vessel or the petitioner * * *." (Emphasis supplied.)

and notwithstanding that there is no provision, either by Statute or Admiralty Rule, authorizing the issuance of a second monition, publication and mailing.

(4) That the Court erred in holding that petitioner's failure to comply with Admiralty Rule 51 was a mere procedural irregularity, subject to correction, after the expiration of the six month period prescribed in 46 U. S. C. Sec. 185, when the Court should have held that such failure was fatal to the Court's acquisition of jurisdiction over the persons of the excepting prospective claimants.

(5) That the Court erred in holding that jurisdiction of the persons of the excepting prospective claimants could be acquired without personal service of process or without constructive service of process as prescribed in Supreme Court Admiralty Rule 51.

(6) That the Court erred in holding that admiralty jurisdiction in limitation of liability proceedings, where relief in personam is sought against prospective claimants, including injunctive relief and the final determination of their claims, is not analogous to the Court's jurisdiction over the person in civil actions and that the notice to be published of the issuance of the monition and the mailing of copies was not service of process in the civil sense, whereas the Court should have held that such service was constructive service of process in the civil sense, there being no other method provided by law for service of process in limitation of liability proceedings.

(7) That the Court erred in holding that the notice to be published and mailed of the issuance of the monition was merely a warning to all potential claimants of the pendency and conclusive character of the proceeding, whereas such publication and mailing, being constructive service, was essential to the compliance with the constitutional requirements of due process of law.

(8) That the Court erred in holding that compliance with U. S. Supreme Court Admiralty Rule 51 is only a condition precedent to the right of the petitioner to contest liability, whereas the Court should have held that such compliance is also a condition precedent to the right to limit liability.

(9) That the Court erred in holding that Supreme Court Admiralty Rule 53 provides that corrective steps in an attempt to acquire jurisdiction over the persons of prospective claimants may be taken after the six month period has expired even if at first the petitioner has not followed the requirements of Admiralty Rule 51, whereas the Court should have held that immediate compliance with Admiralty Rule 51 upon the filing of the petition and bond is a condition precedent to both the right to limit liability and the right to contest liability.

(10) That the Court erred in following the ruling in the case of "*The Chickee,*" D. C. W. D. Penna. (February 7, 1941, Schoonmaker, *D. J.*), 29 F. Supp. 200, whereas the same Court in the same case, as reported in 54 F. Supp. 19 (July 10, 1942) and whereas the U. S. Court of Appeals for the Third Circuit, also in the same case, as reported in 141 F. (2d) 80 (February 8, 1944) held that that petition to limit liability "had no legally operative effect" * * * "and we may dismiss it from further consideration."

(11) That the Court erred in holding that the issuance of a new monition, after the expiration of the six month period, was not the commencement of a new limitation action.

(12) That the Court erred in issuing the orders of June 7, 1950 and of June 8, 1950, in which it denied the exceptions of objecting prospective claimants, whereas it should have sustained said exceptions, dissolved the injunction and dismissed the petition filed November 25th, 1949.

(13) That the Court erred on June 7, 1950 and on June 8, 1950, in ordering the issuance of a new monition and thereafter in issuing such new monition returnable August 15, 1950,—the six month period having expired on March 19, 1950, and the return date on the original defective monition having expired on April 3, 1950.

(14) That the Court erred in ordering that public notice of said new monition be given by publication in the several newspapers mentioned in the order of June 8, 1950, —the six month period having expired on March 19, 1950.

(15) That the Court erred in ordering that a copy of said public notice as so published be mailed to prospective claimants as set forth in the order of June 8, 1950,—the six month period having expired on March 19, 1950.

(16) That the Court erred in ordering that where deaths were involved, a copy of said public notice and a copy of Supreme Court Admiralty Rule 51 be mailed to decedents at their last known addresses and also to any persons who shall be known to have made any claim on account of such deaths, as set forth in said order of June 8, 1950,—the six month period having expired on March 19, 1950.

(17) That the Court erred in its order of June 8, 1950, in directing that the injunction entered on November 30, 1949, enjoining the further prosecution of or institution or prosecution of any further proceedings in any Court, or the taking of any legal action whatever in any other proceedings for any loss, damage or injury done or occasioned by or in consequence of the Noronic disaster, be continued in full force and effect, whereas the Court should have held that the injunction of November 30, 1949 was void and of no effect, the six month period having expired and the Court should have held that it was without jurisdiction on June 8, 1950 to have entered any injunction whatsoever against prospective claimants.

(18) That the Court erred in overruling the exceptions filed by prospective claimants on special appearance on June 14, 1950, by the order filed June 19, 1950.

(19) That the Court erred in holding the word "provided" in Rule 53, Admiralty Rules, means "unless and until" and in ruling that Rule 53 authorizes the Court to issue a new monition and to authorize publication and

mailing of notice to be done at any time prior to a ruling on the merits of the limitation petition.

(20) That the Court erred in finding that the notice of monition as originally published was in substantial compliance with the form prescribed in Admiralty Rule 51.

(21) That the Court erred in overruling the exceptions filed by prospective claimants on special appearance on October 27, 1950.

Prospective claimants appearing specially herein on exceptions reserve the right to urge such further errors as may appear at the hearing on this appeal.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Claimants.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

Dated November 13, 1950.

ALLOWANCE OF APPEAL.

(Entered November 15, 1950 by Paul Jones, Judge.)

The petition of Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants appearing specially in the above entitled proceeding praying for the allowance of an appeal to the United States Court of Appeals for the Sixth Circuit, having been filed herein, and it further appearing that said prospective claimants have filed their assignment of errors herein as required by the Admiralty Rules promulgated by the United States Supreme Court, and it further appearing that the petitioner, by its proctors, has waived issuance and service of a citation and has entered an appearance in said proceeding on appeal;

Now, on application of R. C. Guernsey and J. D. Guernsey, proctors for said prospective claimants appearing specially herein, it is hereby

ORDERED, that such appeal be and the same is hereby allowed as prayed for; and it is further hereby

ORDERED that the amount of the bond for costs to be given by the said Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants appearing specially herein on appeal, is hereby fixed in the sum of Two Hundred and Fifty Dollars ($250.00), subject to the further order of this Court on cause shown for increasing the amount of said security for costs; and it is further

ORDERED that within forty (40) days from the date hereof or such extension thereof as may be granted by this Court, the transcript of the record herein be transmitted to the United States Court of Appeals for the Sixth Circuit.

JONES,
United States District Judge.

Dated:
November 15, 1950.

BOND ON APPEAL IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY.

(Filed November 14, 1950.)

KNOW ALL MEN BY THESE PRESENTS that Howard H. Timanus, Administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, deceased, prospective claimants appearing specially herein, as principal, and New Amsterdam Casualty Company, a corporation organized and existing under the laws of the State of New York, and authorized to do business in the Northern District of Ohio, as surety, are held and firmly bound unto the Canada Steamship Lines, Limited, petitioner, in the sum of Two Hundred and Fifty Dollars ($250.00), the payment of which well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Signed with our respective seals and dated this 14th day of November, 1950.

The condition of the above obligation is such that whereas the said Howard H. Timanus, *et al.*, prospective claimants appearing specially in the above entitled proceeding, have appealed to the United States Court of Appeals for the Sixth Circuit from certain orders of the United States District Court for the Northern District of Ohio, filed on the 7th and 8th days of June, 1950, and on the 27th day of October, 1950, in a proceeding for limitation of liability, wherein said Canada Steamship Lines, Limited, is petitioner.

Now, Therefore, the condition of this obligation is such that if the above named Howard H. Timanus, *et al.*, prospective claimants appearing specially herein, shall prosecute their appeal to effect and shall answer all damages and costs which may be decreed against them, including costs on appeal, in the event the said Howard H. Timanus, *et al.*, appearing specially, fail to make good their appeal, then the above obligation shall be void, otherwise to remain in full force and effect.

HOWARD H. TIMANUS,
Administrator of the Estate of James K. Timanus, Deceased.

HOWARD H. TIMANUS,
Administrator of the Estate of Dorothy Coleman Timanus, Deceased.

In the Presence of:
Augusta Knox,
J. D. Guernsey.

NEW AMSTERDAM CASUALTY COMPANY,
By STANLEY B. MELLOR,
Attorney-in-fact.
(Seal)

In the Presence of:
Grace Ann Pitznick,
I. Shepard.

The within bond is hereby approved as to form and amount this ..... of November, 1950.

United States District Court

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL.

(Filed November 18, 1950.)

Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants, appearing specially herein, and Canada Steamship Lines, Limited, petitioner, by their respective proctors, hereby agree and stipulate that, for the purpose of appeal, the record on appeal in the above entitled proceeding shall include the following:

(1) Entry of special appearance and exceptions in behalf of Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants.

(2) Order of the Court overruling said prospective claimants' special appearance on exceptions, filed October 27, 1950.

(3) Notice of appeal filed November 14, 1950.

(4) Petition for allowance of appeal, filed November 14, 1950.

(5) Assignment of errors, filed November 14, 1950.

(6) Allowance of appeal, filed November 15, 1950.

(7) Bond on appeal, filed November 15, 1950.

(8) Admission of service of notice of appeal, petition for appeal, assignment of errors, waiver of citation and entry of appearance.

(9) The record on appeal now pending in the United States Court of Appeals for the Sixth Circuit, under Case No. 11217 on the docket of said Court, entitled Robert Adamson *et al.*, Appellants, vs. Canada Steamship Lines, Limited, Appellee, without the same being reprinted and refiled herein.

(10) Stipulation as to contents of record on appeal.

(11) Stipulation re certification of record on appeal.

(12) Certificate of Clerk.

GUERNSEY & GUERNSEY,
By J. D. GUERNSEY,

Proctors for Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, Prospective Claimants appearing specially herein.

LECKIE, MCCREARY, SCHLITZ & HINSLEA,
By LUCIAN Y. RAY,

Proctors for Petitioner.

It is requested that the Clerk deliver all of the foregoing items, with the exceptions of those mentioned as constituting the record on appeal in said Case No. 11217, to The Gates Legal Publishing Company at Cleveland, Ohio, for printing.

STIPULATION RE CERTIFICATION OF RECORD ON APPEAL.

(Filed November 18, 1950.)

It is hereby stipulated by and between the proctors for the respective parties hereto that the record as presented to the Clerk by the printer may be certified by the Clerk, as required by law and the rules of the United States Court of Appeals for the Sixth Circuit, as a true, complete and full copy of the original petition for exoneration from or limitation of liability, papers and orders involved in this proceeding, as set forth in the stipulation as to the contents of record on appeal, without further comparison by the Clerk and without waiver of petitioner's right to make application for dismissal of appeal.

GUERNSEY & GUERNSEY,
By J. D. GUERNSEY,

Proctors for Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, Prospective Claimants appearing specially herein.

LECKIE, MCCREARY, SCHLITZ & HINSLEA,
By LUCIAN Y. RAY,

Proctors for Petitioner.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

I, C. B. Watkins, Clerk of the United States District Court within and for said District, hereby certify that the foregoing printed pages contain a true copy of the original pleadings, papers and judgment in accordance with the designation of contents of record on appeal and as required by Civil Rule 75 (g), the originals of which remain in my custody as clerk of said court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said District, this ..... day of November, A. D. 1950.

C. B. WATKINS, *Clerk,*
By K. V. WILSON,
Chief Deputy.

(Seal)

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(November 29, 1950—Before: HICKS, Chief Judge; and MARTIN and MCALLISTER, Circuit Judges.

These causes were argued by Elmer H. Groefsema and J. Harold Traverse for Robert Adamson, et al., by J. D. Guernsey for Harold H. Timanus, Admr. et al., and by Lucian Y. Ray for Canada Steamship Lines, Ltd., and are submitted to the Court.

JUDGMENT

(Entered December 14, 1950)

The above causes coming on to be heard upon the transcript of the record, the briefs of the parties, and the arguments of counsel, and the court being duly advised,

Now, therefore, it is ordered, adjudged, and decreed that the orders of the district court overruling the exceptions to the jurisdiction of the district court, from which the above appeals were taken, be and are hereby affirmed, in accordance with the opinion of the district court.

PETITION FOR REHEARING

(Filed January 3, 1951)

Appellants hereby petition the Court for a rehearing in this matter for the following reasons:

1. The Court has adopted the opinion of the lower court published in 1950 American Marine Cases, 1499, and which opinion states that:

> "In the *Chickee,* 39 F. Supp. 200, the petitioner failed to cause a monition to issue or to have a commissioner appointed before the six months had elapsed. Nevertheless, it was held that petitioner could still proceed in accordance with the statute" (R. 48).

Whereas the same court in the same case, as reported in the *Chickee,* 54 F. Supp. 19, July 10, 1942, and whereas the United States Court of Appeals for the Third Circuit, also in the same case, as reported in 141 F. 2d, 80, February 8, 1944, reversed this earlier decision and held that the petition to limit liability:

> "had no legally operative effect • • • and we may dismiss it from further consideration."

This same point now urged was urged by appellants in their main brief (page 20 *et seq.,* and page 43). Appellees in no way disputed that the opinion relied upon by the District Court was overruled and indeed neither mentioned nor discussed this error in the lower court's opinion.

It would seem that this Court would not knowingly rely upon a District Court opinion which had been reversed by the Court of Appeals for the Third Circuit.

2. The Court has adopted the opinion of the lower court, which opinion holds that a vessel owner may have a monition issued and notices published and mailed at a time selected by itself, which is different from that required by Admiralty Rule 51, and which time is in no way limited or restricted by the six month statutory limitation

period of Title 46, Section 185, U. S. C., and further holds that a vessel owner may do this solely as a matter of right and that the court shall permit it even without any cause being shown. Yet United States Supreme Court Admiralty Rule 51 expressly provides that the *return date* on the *writ of monition* can be enlarged *only upon cause being shown.* The rule provides:

> "The court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, *which time the court, for cause shown, may enlarge.*"

It seems an anomalous ruling that a new writ may issue without cause shown, after the six month statutory limitation period has expired, while the return date on the writ can be extended only with cause.

The District Court opinion has been published in American Marine Cases which is closely followed by admiralty lawyers all over the country. This Court's approval of the District Court opinion will be taken as authorizing a vessel owner to give notice to claimants at any time it shall choose.

3. The Court has adopted the opinion of the lower court, which opinion erroneously holds that Rule 53, Admiralty Rules, provides that constructive steps may be taken if the petitioner fails to comply with Rule 51 in publishing and mailing notices at the times required therein.

The only purpose of Rule 53 as far as it concerns the vessel owner, is to provide a means by which the vessel owner may be at liberty in a limitation of liability proceeding also to put in issue his claim to complete exoneration. That is, he is given the liberty to contest his liability

or the liability of his vessel, (i. e. exoneration) in a limitation proceeding, provided he has met all the requirements of Rule 51, and provided he shall have stated the facts and circumstances by reason of which exoneration is claimed and have given a bond for costs, in addition, of course, to the limitation of liability bond.

Except for Rule 53, the vessel owner could not by virtue of any statute or other rule present the issue of exoneration in the limitation of liability proceeding. This follows because Sections 183-185, of Title 46 U. S. C., deal only with limitation of liability in a forum concursus and say nothing about exoneration from liability and Rule 51 deals exclusively with limitation of liability and does not deal with exoneration, except that in the proposed notice, provision is made for both limitation and exoneration, anticipating that petitioner will, of course, want to invoke Rule 53 at the commencement of limitation proceedings.

The words in Rule 53 "the petitioner shall be at liberty to contest his liability or the liability of said vessel" mean to seek exoneration, complete relief. That phrase has nothing to do with and does not mean contesting right to "limitation of liability" which affords only a partial relief.

The opinion likewise errs in construing the word "provided" in Rule 53 to mean "until". Thus the opinion states:

> "The failure to carry out the requirements of Rule 51 only stays the contest as to liability. See Rule 53, which demonstrates what I believe to be the proper result. It is there stated that the owner shall be at liberty to contest his liability provided he has complied with the requirements of Rule 51. This clearly provides that if he had not complied with that Rule, the monition is ineffective and the limitation proceeding will be stayed *until* a new monition is issued and the notice requirements met (R. 46).

Proceedings to contest limitation only may not go forward *until and unless* Rule 51 is complied with. See again Rule 53" (R. 48).

The District Court has thus injected a time element into Rule 53 when none exists:

Appellants are unable to understand how the court or appellee could place such a meaning on the word provided, particularly when it is used in said Rule in the past perfect tense, "provided he shall have complied with the requirements of Rule 51."

4. The Court has adopted the opinion of the lower court, which opinion erroneously holds that the monition, notice of which is required by United States Supreme Court Admiralty Rule 51 to be published and copies of which notice are required to be served by mail on prospective claimants, is not analogous to process.

Yet such published and mailed notices is admittedly the method by which claimants are brought into the limitation of liability proceeding.

In this respect the lower court opinion says:

> "Jurisdiction does not depend upon personal or constructive service. The notice required by issuance of monition is not service of process in the civil sense * * *." (R. 44.)
>
> "admiralty jurisdiction is not analogous to that in civil actions where jurisdiction is contingent upon valid service of process on the person sued" (R. 48).

The opinion then goes on to define the purpose of the notices—published and mailed—in terms which are identical with the definition of process, saying:

> "it is what the word means,—actual or constructive notice or warning to all potential claimants of the pendency and conclusive character of the proceeding" (R. 44).

See the definitions of process in admiralty, appellants' main brief pp. 9, 10 and appellee's brief, page 47.

Moreover, Rule 51, itself, labels the monition as a writ. It provides in part:

> "The court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said *writ*."

Appellee has conceded that the published and mailed notices of the writ of monition must be served in strict compliance with the method specified in Rule 51 in order that any final decree may be entered against prospective claimants, (Appellee's brief pp. 44, 45.)

This admission is demanded by reason of the decision of the United States Supreme Court in *Mullane* v. *Bank*, 339 U. S. 306, 1950. The function of the mailed notices in the instant proceeding is identical with that of the mailed notices required by *Mullane* v. *Bank*. The Court in that case held that the notice was process and was essential to the jurisdiction of the Court. The opinion in the instant proceeding, holding that the notices are not process, is in this respect in direct conflict with that of the United States Supreme Court.

5. The court has adopted the opinion of the lower court, and that opinion erroneously holds that there is no:

> "limitation period within which the monition and notice of monition or notice to claimants had to issue" (R. 48).

This is erroneous for there are specific time limits in Rule 51. The rule says that the monition shall issue "upon" the filing of the security. Appellants cited (page 29, 30 main brief) several decisions construing the word "upon" and dictionary definitions of the same word. None of the constructions could be stretched to make "upon" mean eight months thereafter, which is the ef-

fect of the Court's decision in the instant case. Appellees in their brief cited no authority on this point and indeed made no response to this argument of appellants. Appellee never claimed there were no time requirements in Rule 51. Appellee's position was rather that although the time requirements of Rule 51 were not met, subsequent compliance at any time before a final decree was sufficient to give the court jurisdiction. (A final decree in some jurisdictions, such as New York would be more than four years after the filing of petition. Such a construction would emasculate the six month limitation period in 46 U. S. C., 185).

Rule 51 has the further time requirement that the mailed notices must be sent to known claimants "not later than the day of second publication." The date of second publication in the instant case was December 12, 1949.

The District Court must have realized that there was this time requirement in Rule 51 since the only apparent purpose in requiring new publication, as that court did require, was to create a new "day of second publication" before which the mailed notices might be sent out. The District Court thus tacitly recognized, that it could not create a method of constructive service differing from that set up in the rule. The court however destroys any meaning in the word "second" if by its own order it can create a new second publication date or any number of second publication dates.

The District Court admitted:

> "*A different result would follow if there were a limitation period within which the monition and notice of monition or* notice to claimants *had to issue.* As pointed out earlier no such limitation exists" (R. 48).

(May we note parenthetically that the District Court did not point out earlier or anywhere in the opinion that no such limitation existed.)

It would seem that this court would not wish to adopt this paragraph of the District Court opinion in view of

the express time limitation in Rule 51, embraced in the words "upon" the filing of the security and "not later than the date of second publication."

Respectfully submitted,

KENNETH C. DAVIES,
W. ALEXANDER ELDRIDGE,
ELMER H. GROEFSEMA,
VICTOR M. TODIA,
J. HAROLD TRAVERSE,
GUERNSEY & GUERNSEY.

CERTIFICATE OF COUNSEL

I, one of the proctors for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ELMER H. GROEFSEMA.

ORDER DENYING PETITION FOR REHEARING

(Filed February 2, 1951)

The petition for rehearing is denied.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Harold H. Timanus, Admr. et al.* v. *Canada Steamship Lines, Limited*, No. 11,294, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of March, A.D. 1951.

J. W. Menzies,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(seal)

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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

ROBERT ADAMSON, et al.,
Prospective Claimants Appearing Specially,
Petitioners,
vs.
CANADA STEAMSHIP LINES, LIMITED,
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit entered December 14, 1950 (185 F. 2d 1019) affirming the judgment of the District Court for the Northern District of Ohio, Eastern Division (93 F. Supp. 549).

SUMMARY OF MATTER INVOLVED

I.

This is a proceeding in admiralty for limitation of liability of Canada Steamship Lines, Limited, under Section 185, United States Code. (As amended June 5, 1936, c. 521, §3, 49 Stat. 1480.) That section provides that a vessel owner may petition for limitation of its liability within six months after the first written notice of claim. This is a special privilege afforded vessel owners and must be exercised within that period.

The Noronic, owned and operated by Canada Steamship Lines, Limited, a corporation of the Dominion of Canada, (hereinafter referred to as the vessel owner) was destroyed by fire while lying at dock at the Port of Toronto, Ontario, Canada, on September 17, 1949, resulting in the loss of life of about one hundred twenty (120) passengers, personal injuries to over two hundred (200) others, and heavy loss and damage to personal property of passengers and crew (R. 2, 3).

The petitioners herein are the majority of the passengers and personal representatives of passengers who were injured or killed in the fire.

The first written claims against the vessel owner were made on September 19, 1949, two (2) days after the disaster (R. 32, 35, 37). Thus, the six month limitation period provided for in 46 U. S. C., Sec. 185, within which a vessel owner is privileged to petition a District Court for limitation of its liability expired on March 19, 1950.

A petition seeking complete exoneration from or limitation of liability and a statutory bond were filed on November 25, 1949 (R. 2, 10).

On November 30, 1949, the District Court entered an order enjoining persons who had commenced actions against the vessel owner from further prosecution thereof, and also enjoining all prospective damage claimants from instituting new suits and further ordering that a monition (the writ or process used in such proceedings) issue, directing all such claimants to file claims on or before April 3, 1950, with the Commissioner appointed by the Court. Claimants included residents of several states.

United States Supreme Court Admiralty Rule 51 provides for constructive service of process in limitation proceedings by publication and mailing of written notices to known claimants. The rule provides that this notice shall be mailed not later than the date of second publication.

The order of the District Court directed that notice of the monition should be published once a week until the return date of the monition, April 3, 1950 (R. 12).

On November 30, 1949, a writ of monition or process issued under the seal of the Court returnable April 3, 1950 (R. 15).

Commencing on December 5, 1949, and once each week thereafter until April 3, 1950, the United States Marshal caused a notice of monition, but not in the form provided for in Rule 51, to be published in the newspapers designated by the Court (R. 16, 17 and 26). The second publication was had on December 12, 1950 (R. 26).

All the claimants herein were known by the vessel owner to have made claims against it. The vessel owner failed to mail the notice to them as required by Rule 51 (R. 43). Thus, constructive service of the process issued to the United States Marshal by the Clerk of the Court on November 30, 1949, was not made on claimants (opinion by District Judge Jones, R. 43) in the manner required by Rule 51.

As stated above, the six month period of limitation commencing September 19, 1949, expired on March 19, 1950 (R. 32, 35, 37). On April 3, 1950, damage claimants filed their special appearance on exceptions to the jurisdiction over their persons for the reason that neither personal nor constructive service was had upon any of them and for the further reason that the published notice did not comply with Rule 51 of the United States Supreme Court Admiralty Rules (R. 18).

The vessel owner filed affidavits on May 15, 1950, contending that it had given some actual notice to some prospective claimants, although not in conformity with Rule 51 as to form, content or time (R. 38, 40).

OPINION OF THE DISTRICT COURT REPORTED IN 93 F. SUPP. 549

One June 7, 1950, the District Court handed down a memorandum opinion holding that although more than six months had passed since the first written notice of claim and more than twenty-seven (27) weeks had passed from the day of the filing of the petition and bond, and that although Rule 51 had not been complied with so that petitioners in this court had not yet been made parties to the limitation proceeding, and although the first writ of monition had expired on April 3, 1950, jurisdiction could be acquired over the persons of the excepting claimants in the manner then proposed by the vessel owner, i. e., by the court then issuing a proper monition, proper order of publication and mailing, by publishing a proper notice of monition in the form prescribed by Rule 51 and by mailing notices of the type and form and to the persons as required by Rule 51 (R. 48, 49), even though the six month period prescribed in Sec. 185 U. S. C. had expired. The court con-

strued United States Supreme Court Admiralty Rule 53 as permitting service to be had on claimants up until the time of trial on the merits.

On June 8, 1950, the Court denied the exceptions of the damage claimants and on the same date entered a new order for a second monition and injunction, publication, and mailing of notices and copies of Rule 52, all to be based upon the petition for exoneration from and limitation of liability and the bond filed November 25, 1949 (R. 50). In pursuance thereof a new writ of monition or process was issued and publication thereof had and notices mailed in accordance with the order of the court (R. 52, 53, 56).

Damage claimants filed their special appearance on exceptions to the new monition and injunction June 14, 1950, and the same were overruled on June 19, 1950 (R. 55, 56).

The District Court ruled that the writ of monition was not process nor analogous to process in a civil action (R. 44). It held that Sec. 185 U. S. C. provides that all claims against the vessel owner cease when the petition is filed even though no service is had on the claimants and that mere filing of the petition confers jurisdiction upon the court which tolls the statute of limitations even though constructive service of process in accordance with the Rules is not had. The court reasoned that such a conclusion was required by Rule 53, Admiralty Rules of the Supreme Court.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT REPORTED IN 185 F. 2d 1019

The Circuit Court of Appeals adopted the opinion of the District Court without modification.

JURISDICTION TO REVIEW

The Court of Appeals for the Sixth Circuit entered its order adopting the opinion of the District Court on the 14th day of December, 1950, thereby affirming the denial of petitioners' exceptions to the jurisdiction of the District Court.

1. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1254 (1) which provides that cases in the Court of Appeals may be reviewed by the Supreme Court upon the writ of certiorari upon the petition of a party.

2. The orders appealed from are final decisions within the meaning of Title 28, Section 1291, United States Code, and the decisions of this court in *Cohen, Executrix, et al. v. Beneficial Industrial Loan Corp., et al.*, 337 U. S. 541 (1948) and *Swift & Co., Packers v. Compania Caribe*, 339 U. S. 684 (1950).

3. The orders appealed from are appealable under Title 28, Section 1292, (1) United States Code, since they continue an injunction and refuse to dissolve an injunction as construed by *Enelow v. New York Life Insurance Co.*, 293 U. S. 379, and *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F. 2d 273.

4. The orders appealed from are interlocutory orders determining the rights and liabilities of parties in an ad-

miralty case in which an appeal from a final decision is allowed, Title 28, Section 1292 (3).

Rice Growers Ass'n of California v. Frode, 171 F. 2d 662 (C. C. A. 9, 1948).

STATUTES AND RULES INVOLVED

The appeal involves the construction of United States Supreme Court Admiralty Rules 51 and 53, and 46 United State Code, Sec. 185. (As amended June 5, 1936, c. 521, §3, 49 Stat. 1480.) The rules and the statute are set out in the appendix to the ~~petition~~ BRIEF.

QUESTION PRESENTED

Where Rule 51, Admiralty Rules of the United States Supreme Court, prescribes the time and manner in which the vessel owner shall bring in as parties to a limitation of liability proceeding in admiralty, prospective claimants from many states by constructive service of process, and where the vessel owner fails to follow the procedure prescribed, may the District Court authorize the vessel owner to obtain constructive service in some other manner after the six months' limitation provided for in 46 U. S. C. 185 has run and after prospective claimants have appeared specially objecting to the jurisdiction of the court over their persons?

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals, by affirming the lower court, ruled that the District Court had obtained jurisdiction over the entire limitation proceeding, including the power to

adjudicate the rights of prospective claimants, by the mere filing of petition and bond and "that jurisdiction did not depend upon personal or constructive service." In so ruling, the court erroneously held that the published and mailed notices of the writ of monition and the pending limitation proceedings, which are required by Rule 51, United States Supreme Court Admiralty Rules, are not process, although they are the only method provided by rule or statute for advising claimants of the pendency of proceedings in which their rights will be adjudicated.

2. The Court of Appeals by affirming the District Court erred in holding that United States Supreme Court Admiralty Rule 53 enlarges the time prescribed in Rule 51 to permit published and mailed notices to be given at any time before trial on the merits, whereas Rule 53 relates to the method in which the vessel owner may include a claim for complete exoneration within the proceeding for limitation of its liability. The effect of this construction of Rule 53 is to substitute for the explicit time requirements of Rule 51 another time to be chosen by the vessel owner and to be limited, if at all, only by the up-to-date-ness of the docket of the particular court in which the limitation proceeding is brought.

3. This Court directed by Admiralty Rule 51 that the monition be issued "upon" filing security and the published notice of the issuance of the monition be mailed to known claimants "not later than the day of second publication," but the District Court and Court of Appeals held that the monition may issue and notice may be published and mailed at any time before trial by misapplying and misconstruing Admiralty Rule 53 to so hold. Contrary to holding of the District Court (R. 46, 48, 49) (affirmed by the Court of Appeals) Rule 53 does not provide for retention of jurisdiction until Rule 51 is complied with; nor does Rule 53 stay the

limitation proceedings until a new monition is issued and notice requirements met (as the District Court held R. 46); nor does Rule 53 indicate that corrective steps may be taken if at first the vessel owner has not followed Rule 51 (as the District Court held R. 47) and finally Rule 53 does not provide that "proceedings to contest limitation only may not go forward until and unless Rule 51 is complied with" (as the District Court held R. 48).

4. Having erroneously held that it had jurisdiction without service of process over the persons of adverse claimants and having erroneously held that Rule 53 enlarges the time for issuance of process and service thereof, and that Rule 51 need not be complied with, the Court of Appeals sanctioned the issuance of new process two and one-half months after the six month statute of limitations had expired and at a time when concededly it was not possible to file a new petition and bond because of the bar of statute of limitations.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decisions of the Courts below nullify the constructive service of process requirements of Rule 51 promulgated by this Court that the written notice shall be mailed to known claimants "not later than the day of second publication" and that the writ of monition shall issue "upon" the filing of the security in direct violation of the plain and unambiguous language of Rule 51. Such a ruling is in direct conflict with the long line of decisions, both in this Court and in every court, that constructive service of process may be had only where provided for by rule or by statute and that the method prescribed in such rule or statute must be strictly followed.

2. The decisions of the courts below are in direct conflict with the decision of this Court in *Mullane, Special Guardian, v. Central Hanover Bank and Trust Company* (1950), 339 U. S. 306, wherein this Court held that notices by mail, where practicable, were essential to the jurisdiction of the court to determine rights of persons in action *in rem* or *quasi in rem*. The decision in the instant case holds that the notices to adverse claimants, all of whose rights against the vessel owner are determined in the limitation proceedings, are not essential to the jurisdiction of the court, but are merely courtesy warnings and not process.

3. The decision of the courts below are in direct conflict with the decision of this Court in *Linn and Lane Timber Company v. United States*, 236 U. S. 574, and that of the 9th Circuit Court of Appeals in *United States v. American Lumber Co.* (1898), 85 F. 827, holding that process must be issued before the statute of limitations has run. In the instant case the writ of monition, service of which was finally made, issued more than two and one-half months after the six month statute of limitations had run, thus enlarging the time more than thirty per cent.

4. This case raises an important question of federal law concerning the construction of Admiralty Rule 51, promulgated by the Supreme Court, particularly whether the provision thereof relating to constructive service of process must be followed or whether the District Court may substitute a different manner of obtaining constructive service authorized neither by rule nor statute. The decision of the Court of Appeals permits vessel owners to ignore the provisions of Admiralty Rule 51 and make constructive service at a later time without any cause shown. The decision of the District Court has been printed in American Marine

Cases which is widely followed by admiralty lawyers throughout the country, as well as in the Federal Supplement. The uniformity as to time and manner of issuance of process and service thereof set up in Rule 51 will, unless review be granted, again vary in the various district courts, as it did before Rule 51 was amended and the reforms achieved by the 1948 amendment to Rule 51 will be nullified.

5. The case presents an important question of federal law which has not been, but should be, decided by this Court, namely, what steps must be taken by a vessel owner within the six month period following the first written notice of claim. This six month limitation period was added by a 1936 amendment to the United States Code and was intended to limit the privilege of the vessel owner. Under the decision of the Court in the instant case, this six month restriction becomes meaningless. This Court recently took jurisdiction in the case of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949) and settled the question of what steps were necessary to toll the statute of limitations in diversity of citizenship cases. The instant case raises a similar question in admiralty which has never been decided by this court. The question presented by this petition is one on which there is now a conflict among the various courts of appeals. The Court of Appeals for the Second Circuit has held in *Petition of Goulandris*, 140 F. (2d) 780 (1943), that where merely the petition is filed within the six month limitation period of 46 United States Code Sec. 185, and nothing more is done, that the limitation period is not tolled. The Court of Appeals for the Third Circuit in *The Chickie*, 141 F. (2d) 80, (1944), ruled similarly. In addition, the bond was filed in the instant proceeding within the statutory period, but this cannot be the controlling requirement since in some limitation of liability proceedings where the vessel is a complete loss

there may be no bond required. *Benedict on Admiralty,* 6th Ed. Sec. 482, 479; *The Miramer,* 31 Fed. 767 (S. D. N. Y. Knox, D. J.).

6. The Supreme Court should exercise its jurisdiction to review the instant case because the District Court and Court of Appeals have misconstrued Rule 53 so as to distort its whole purpose and function and so as to nullify Rule 51. Those courts erroneously interpreted Rule 53 as governing and controlling limitation of liability proceeding, whereas the function and purpose of Rule 53 is to provide the method whereby the vessel owner is privileged to join its claim for full and complete exoneration with its petition for limitation of liability in a *forum concursus.* Contrary to the ruling of the District Court, Rule 53 in no way relates to retention of jurisdiction by the court in a limitation of liability proceeding; nor does it have anything to do with dismissal of a limitation of liability proceeding or failure to dismiss it. Rule 53 does not in any way relate to the time when process must be issued or served nor does it contain any provision making failure to comply with Rule 51 have the effect only of staying the proceedings with respect to limitation. In all of these interpretations of Rule 53, the District Court and Court of Appeals committed palpable error.

Wherefore your petitioners respectfully pray that a writ of certiorari issue out of this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit commanding that Court to certify and send to this Court for review and determination, on a day certain, to be named therein, a full and complete transcript of the record and the proceedings in the case, numbered and entitled on its docket, *Robert Adamson, et al. v. Canada Steamship Lines, Limited,* No. 11,217, and that the decision

of the United States Court of Appeals for the Sixth Circuit in this case may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as may be just.

ROBERT ADAMSON, et al.,
By s/ ELMER H. GROEFSEMA,
Attorney for Petitioners.

I hereby certify that the foregoing petition is in my opinion well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

s/ ELMER H. GROEFSEMA,
Attorney for Petitioner.

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 601

ROBERT ADAMSON, et al.,
Prospective Claimants Appearing Specially,
Petitioners,
vs.
CANADA STEAMSHIP LINES, LIMITED,
Respondent

Motion of Harold H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Harold H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, for Permission to Join in Petition for Certiorari

Now comes Harold H. Timanus, administrator of the estate of James K. Timanus, deceased, and Harold H. Timanus, administrator of the estate of Dorothy Coleman Timanus, deceased, and moves the court to permit them to join in the petition for writ of certiorari in the above entitled case, for the reasons that:

Said parties appealed to the United States Court of Appeals for the Sixth Circuit from orders of the District

Court of the Eastern District of Ohio, which were substantially the same as the orders appealed from in the above entitled case and that the appeal taken by Timanus, *et al.*, was consolidated in the Court of Appeals with the appeal of Adamson, *et al.*, the above entitled case, and said appeals were argued as one case and were determined by the Court of Appeals in one judgment as appears from the record of the above entitled case docketed in this Court.

A single petition for rehearing was filed on behalf of Timanus, *et al.*, and of Adamson, *et al.*, and was decided by a single order of the Court of Appeals dated February 2, 1951. In the Court of Appeals the Adamson, *et al.* record was used by Timanus, *et al.*, moving parties herein, together with a short supplemental record which contained the orders appealed from (of the same import as the orders of the Adamson *et al.*, record but entered on different dates and relating to Timanus, *et al.*), the separate notice of appeal, stipulation with respect to contents of the record, etc., certified copy and additional copies of which are submitted herewith.

Timanus, *et al.*, desire to adopt the petition for certiorari and brief in support thereof now on file in *Adamson, et al. v. Canada Steamship Lines, Ltd.*, the above entitled case.

The granting of this motion will eliminate the necessity of filing on behalf of Timanus, *et al.*, a duplicate of the petition and brief now on file in the above entitled case, thereby saving expense to the litigants and labor on the part of this Court.

Wherefore, Timanus, *et al.*, move that they be permitted to join in the petition for writ of certiorari in the above entitled case and be permitted to docket in this Court the supplemental record filed by them in the Court of Appeals.

This motion is based upon the record docketed in this Court in the above entitled case and the affidavit of Elmer H. Groefsema, attorney for the parties in the above entitled case, as well as for Timanus, *et al.*, the parties making this motion.

Signed: ELMER H. GROEFSEMA,
Attorney for Harold H. Timanus, adminstrator of the estate of James K. Timanus, deceased, and Harold H. Timanus, administrator of the estate of Dorothy Coleman Timanus, deceased.

AFFIDAVIT OF ELMER H. GROEFSEMA IN SUPPORT OF MOTION FOR PERMISSION TO JOIN IN PETITION FOR CERTIORARI

State of Michigan,
County of Wayne—ss.

Now comes Elmer H. Groefsema, a member of the bar of this Court, and deposes and says that he has read the foregoing motion and that the facts stated therein are true of his own knowledge.

/s/ Elmer H. Groefsema.

Subscribed and sworn to before me this 29th day of March, 1951.

Betty Stone,
Notary Public, Wayne County, Michigan.
My commission expires August 9, 1952.

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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

ROBERT ADAMSON, et al.,
Prospective Claimants Appearing Specially,
Petitioners,
vs.
CANADA STEAMSHIP LINES, LIMITED,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CLAIMANTS' ARGUMENT

Where the United States Supreme Court Admiralty Rule 51 prescribes the time and manner in which the vessel owner shall bring in as parties to a limitation of liability proceeding in admiralty, prospective claimants from many states by constructive service of process, and where the vessel owner fails to follow the procedure prescribed, the District Court can not authorize the vessel owner to make constructive service of process at some other time and manner, particularly where the six month limitation of 46 U. S. C., 185, has already expired.

BACKGROUND AND HISTORY OF APPLICABLE STATUTES AND RULES

The instant statutory proceeding was brought by the vessel owner pursuant to 46 United States Code, Section 185. (As amended June 5, 1936, c. 521, §3, 49 Stat. 1480.) By virtue of that statute, a vessel owner within six months after the first written notice of claim against it "may petition" a District Court for limitation of its liability to the value of the vessel owner's interest in the vessel after the disaster, and shall file a bond or surrender the vessel as security. This section was enacted in 1936 and supplements Section 183, 46 United States Code, which contains the provision of substantive law that the liability of a vessel owner shall be limited to the value of the vessel where there is no privity or fault on the part of such owner.

Prior to 1936 the methods by which this substantive law could be carried out were entirely controlled by the Rules of the United States Supreme Court supplemented by local District Court rules. Likewise, prior to 1936, there was no time limit on this privilege of a vessel owner. The privilege could be exercised even after judgment against it. The 1936 amendment was enacted by Congress to restrict the privilege of the vessel owner by requiring that it be exercised if at all within six months.

The requirements of petitioning for limitation of liability both prior to and after the 1936 amendment are covered by the Admiralty Rules of the United States Supreme Court numbers 51-55, inclusive.* These rules provide that the writ of monition shall issue "upon" the filing of a

*The Admiralty Rules of the Supreme Court have the force and effect of statute. 28 U. S. C. Sec. 2073.

bond or other security. They further provide for constructive service of process on all adverse claimants and for the determination of all claims in one proceeding. Prior to 1948, these rules required published notice of the pendency of the proceeding and such further notice as the District Court should require in a particular proceeding.

In 1948, the United States Supreme Court amended the Rules to add the requirement that in addition to publication, notice be sent by mail to known claimants. Rule 51 requires that this be done "not later than the day of second publication." Thus, the statute and the Rules now provide a complete and uniform procedure and the complete timetable in the limitation of liability proceeding.

VESSEL OWNER FAILED TO FOLLOW PROCEDURE PRESCRIBED BY RULE 51

The vessel owner in the instant proceeding failed to follow the requirements of Rule 51 relating to service of process and the District Court so ruled (R. 43).

The notice published did not meet the requirement specified in the rule and the vessel owner failed to mail notices to adverse claimants although Rule 51 specifically directs that such notices shall be mailed "not later than the day of second publication".

The six month statute of limitation expired. The return date on the writ of monition passed by and the writ expired. Prospective claimants appeared specially and objected to the court's jurisdiction on the ground that they had not been served and could no longer be brought in as parties since the statute of limitations had run.

CONSTRUCTIVE SERVICE REQUIRES STRICT COMPLIANCE

The service of process contemplated in the instant proceeding is constructive service by publication and mailing. The law is clear and uniform that constructive service can be had only when a rule or statute so provides, and then only by following the method provided for in the rule or statute.

With regard to substituted or constructive service, *42 Am. Jur.*, pp. 55 and 56, states as follows:

> "Substituted service and service by publication was unknown to the common law but depends upon statutory authorization * * * When, by the local law, substituted or constructive service is in certain situations substituted in the place of personal service when the latter is inconvenient or impossible, a strict and literal compliance with the provisions of the law must be shown in order to support the judgment based on such substituted or constructive service. Jurisdiction is not to be assumed and exercised on the general ground that the subject matter of the suit is within the power of the Court. The inquiry must be as to whether the requisites of the statute have been complied with, and such compliance must appear on the record. The fact that the defendant had actual knowledge of attempted service does not render the service effectual if in fact the process was not served in accordance with the requirements of the statute."

The same rule was settled early in the decisions of this Court.

Galpin v. Page (1873), 85 U. S. (18 Wall.) 350 at 369;

Settlemier v. Sullivan (1878), 97 U. S. 444 at 447;

Cheely v. Clayton (1884), 110 U. S. 701;
Kibbe v. Benson, 84 U. S. (17 Wall.) 624;
Munro v. United States (1938), 303 U. S. 36, 41.

Admiralty cases involving constructive service state the same rule.

The General Pershing-Criscuolo v. Atlas Imperial Diesel Engine Co., 9 Cir. (1936), 84 F. (2d) 273;
Bailey v. Sundberg, 2 Cir. (1892), 49 F. 583;
Atkins v. W. R. Carpenter & Co., Ltd., N. D. Cal., 1921, 273 F. 828;
Yokohama Specie Bank Limited v. Chengting T. Wang, 9 Cir., 113 F. (2d) 329 (1940);
March v. U. S., et al., N. D. Cal., 84 F. Supp. 829 (1949).

There is absolutely no authority that constructive service may be ordered where not authorized by statute or rule or that a court order may substitute a time for service that differs from that in the rule or statute.

DISTRICT COURT SUBSTITUTED ITS OWN METHOD OF CONSTRUCTIVE SERVICE FOR THAT PROVIDED BY SUPREME COURT ADMIRALTY RULE 51

Yet that is what the District Court did in the instant case. It permitted the vessel owner to send out mailed notices in June 1950, although the date of second publication had been December 12, 1949, and Admiralty Rule 51 requires that the mailed notices be sent out "not later than the day of second publication.

The court, although not acknowledging that it could not vary the method of constructive service set up in Rule

51, apparently realized that this was the case. It, therefore required that the vessel owner again publish the notice required by Rule 51 so that the mailed notices would not be sent out entirely unrelated to any publication. The court was undoubtedly attempting to "create" a new date of second publication. The District Court had another hurdle to overcome, however. Rule 51 requires that notice of the monition be published *before the return date of that writ.* The writ in the instant case had expired with its return date of April 3, 1950. The statute of limitations had expired March 19, 1950. It was now June, 1950. The District Court nonetheless issued a new writ of monition. Nowhere in the Admiralty Rules is there any provision for such a second writ. The issuance of such a writ was in direct conflict with the requirement of Rule 51 that "upon the filing (of the security) the court shall issue a monition against all persons asserting claims."

The court went directly contrary to this provision when it issued a second writ of monition in June, 1950, for under no interpretation of the word "upon" could it be construed to mean eight months thereafter. The dictionary definitions and what case construction there is of the word "upon", are uniform to the effect that "upon" means "as soon as" or "at the time of" or "immediately". See *Black's Law Dictionary,* Third Edition, 1933, page 1291; *Slaughter v. Robinson,* Utah (1918) 173 Pac. 456; *In re Hygrade Cake Baking Co., Inc.,* D. C. N. Y. (1937) 21 F. Supp. 314.

Moreover the District Court had isued a writ of monition in the instant case 'upon" the filing of the security. The vessel owner failed to properly use this writ and permitted it to expire without obtaining constructive service of process. This case is not one where the court for some reason failed to act. Rule 51 requires the vessel owner

to mail the notices. Thus, the District Court did not issue the second writ of monition in the instant case to correct some error of its own, but in an attempt to correct the failure of the vessel owner to obtain service, and to keep the limitation of liability proceeding alive for the benefit of the vessel owner after the statute of limitations had expired, when a new proceeding could no longer be brought. There is absolutely no provision in Rule 51 or any of the other Admiralty Rules relating to limitation of liability proceedings nor is there any case authority authorizing or sanctioning a second writ of monition.

ISSUANCE OF NEW PROCESS CONSTITUTED COMMENCEMENT OF NEW SUIT AFTER STATUTE OF LIMITATIONS HAD RUN

Not only did the District Court go contrary to the express provision of Rule 51 in issuing the second writ of monition eight months after the filing of the security, although issuance was required "upon" the filing of the security, but it did so after the statute of limitations had expired.

Federal law with respect to what constitutes the commencement of an action so as to prevent it being barred by the statute of limitations is somewhat sparse. The available decisions however, are to the effect that process must be issued and alive at the time the statute of limitations runs. This rule is clearly expressed in *United States v. American Lumber Co.*, 9 Cir. (1898) 85 F. 827, a case which involved constructive service of process and therefore also illustrates the requirement that there be strict compliance with a statute authorizing constructive service. In that case, process issued within the period of the

statute of limitations but this process was not served in the manner required for non-resident defendants. After the statute of limitations ran, new process was issued which was served properly. The court held that the suit had not been started within the period permitted by the statute of limitations. The first process which was improperly served was held to have been of no effect and the second process, issued after the statute of limitations had expired was of no avail.

This is likewise the rule enunciated by this Court in *Linn & Lane Timber Co. v. United States,* 236 U. S. 574. In that case this court approved the American Lumber Company case *(supra)* and held:

> "The bills were filed and subpoenas (process) were taken out and delivered to the Marshal for service before the statute had run, reasonable diligence was shown in getting service and therefore the rights of the United States against all the patents were saved. For when so followed up the rule is pretty well established that the statute is interrupted by the filing of the bill."

In the instant case the writ of monition which had issued within the period of statute of limitations expired without being served. There was no cause shown for such failure to serve. The writ under which notices were finally mailed did not issue until nearly three months after the statute of limitations had run, and until two months after the first writ had expired.

CONFLICT BETWEEN COURTS OF APPEALS FOR OTHER CIRCUITS

The ruling of the Court of Appeals in the instant case conflicts with that of the Second Circuit in *Petition of Goulandris*, 140 F. (2d) 780, and the Third Circuit in *The Chickie*, 141 F. (2d) 80, (1944)* in both of which cases it was held that the mere filing of the petition within the six months period did not stop the bar of the statute of limitations. The bond was likewise filed by the vessel owner within the six month period in the instant limitation proceeding, but this step cannot be a jurisdictional requirement since in some limitation of liability proceedings where the vessel is a complete loss there may be no requirement that a bond be filed at all. *Benedict on Admiralty*, 6th Ed., Sec. 482, 479.

DECISION EQUIVALENT TO JUDICIAL REPEAL OF STATUTE OF LIMITATIONS

The effect of the District Court's decision is to extend the six month statute of limitations of 46 U. S. C. 185 to some indefinite and indeterminable period. Instead of the program contemplated by the statute and rule—a petition and bond filed within six months; a writ of monition issued "upon" the filing of the security; publication for a minimum of four successive weeks and mailing of notices "not later than the day of second publication"—the court's decision permits the vessel owner, as a matter of right, to have process at any date after the filing of security—in the instant case eight months thereafter—per-

*This decision by the Third Circuit reversed the decision of the lower court in that same case (reported in 39 F. Supp. 200) which District Court opinion was strongly relied upon by Judge Jones (R. 48).

mits publication and mailing at a time selected by the vessel owner. The six months statute is thus completely nullified if the ruling of the lower courts is to be the controlling law in limitation of liability proceedings in the United States.

If the vessel owner could wait two and one-half months after the expiration of the six months statute of limitations to cause process to issue under Rule 51—seven months after the filing of the security (when the rule says "upon")—by the same token it could have waited twelve months or any longer period of time. This cannot be permitted because it would defeat every purpose Congress had in mind in establishing a time limit in limitation proceedings.*

The date of issuance and service of process, rather than the date of filing the petition, determines for the damages claimants the time within which they can effectively obtain counsel, gather evidence by way of deposition, conduct the necessary investigation and take the other steps essential to protect their rights. Those who are acquainted with the practice in this field are well aware that a delay of eight months in taking depositions may be fatal to the entire cause of action. No one profits by delay except the vessel owner, who is thus to be benefited by his own delay if the decision of the Court of Appeals is approved.

Another purpose of the statute, namely, to avoid a multiplicity of suits, is likewise defeated by ignoring Rule 51

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*Benedict on Admiralty, Sixth Ed. (1940), Vol. 3, p. 352.

"A petition for limitation must be filed within six months after receiving or filing the first notice of claim. The purpose of this new section is to alter the old rule, which permitted a shipowner to wait until he was sued, then to defend the case on the merits, appeal from an adverse judgment and, after affirmance by the appellate court, still file his petition for limitation of his liability. It seems likely that the six months rule will be strictly applied."

and adopting the construction of the statute and Rule of the District Court and Court of Appeals. For the damage claimants, if they are not to be served with process until the vessel owner elects to serve them, will undoubtedly start their many individual actions.

The limitation as to time is for claimants' benefit, and the time when the claimant is served with process is the important time to him.

ERRONEOUS CONCLUSION DIRECT RESULT OF DISTRICT COURT'S ERRONEOUS PREMISE THAT PUBLICATION AND MAILING OF NOTICE TO CLAIMANTS WAS NOT SERVICE OF PROCESS

The District Court sought to avoid the issue of the statute of limitations by holding that the publication and mailing of notices were not constructive service of process, and that the jurisdiction of the court did "not depend upon personal or constructive service."

Such ruling is clearly erroneous. The instant proceeding is an adversary one in which *all rights* which damage claimants have against the vessel and vessel owner are to be finally determined. There was no personal service and none is contemplated by the rules relating to limitation proceedings. The publication and mailing of a notice of the writ of monition must be constructive service of process, or else the statute and rules contemplate determination of claimants' rights both *in personam* and *in rem* without service of process.

The holding of the District Court in this respect is in direct conflict with the decision of this court in *Mullane v. Trust Co.*, 339 U. S. 306 (1950). In that case it was held that in order to have a judicial settlement of accounts of a

common trust fund that would be binding and conclusive against persons having an interest therein, those persons must have notice of the settlement of account, not only by publication, but also by mailing, where practicable. In the instant case the vessel owner had a passenger list with addresses so that mailed notices were clearly practicable but notices were simply not mailed. There is also in the instant case the explicit requirement of Rule 51 that notice by mail be sent not later than the date of second publication. In the Mullane case, the New York statute required only publication. Yet publication was held ineffective to meet the due process requirements as to notice. This Court said at page 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and cf. *Goodrich v. Ferris*, 214 U. S. 71."

If due process demanded that mailed notices be sent to parties adversely affected in the Mullane case, how can the District Court's opinion, that mailed notices are not a jurisdictional requirement, be sustained in this case?

Any doubt but that claimants are entitled to legal notice, can be eliminated by considering what would happen if claimants had not appeared in the limitation proceedings at all. In such event it is obvious that the court, had it

limited the petitioner's liability or exonerated it from liability, or had it defaulted claimants who had not appeared, would have done so without according the nonappearing claimants proper opportunity to be heard. The court would have determined their *in personam* rights against the vessel owner without their ever having been brought in as parties to such proceeding. Such a result would not be due process of law. Claimants, by appearing specially, have reserved all rights they might have to object to the jurisdiction of the court over their persons.

NO JURISDICTION OBTAINED OVER CLAIMANTS BY MERE FILING OF PETITION AND BOND

Following its false premise that the published and mailed notices were not service of process, the District Court ruled that its jurisdiction was in no way dependent upon service of process but was acquired by the mere filing of a petition and bond by the vessel owner. The District Court believed it found support for this anomalous ruling in Section 185, 46 United States Code, which provides that "upon compliance with requirements of this section, all claims against the vessel owner shall cease." But the District Court and the Court of Appeals were in error in holding that filing the petition and bond were the requirements of this section. The statute says:

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, *may petition* a district court of the United States of competent jurisdiction for limitation of liability * * * [and shall file security]."

The statute says nothing about "filing a petition." It says "may petition the court." To petition does not mean

just to file a petition. To ascertain what steps to take in petitioning the court, reference must be had to Rule 51. It is only in Rule 51 that anything is said about "*filing*" a petition and the filing is only one of the many steps which are set out in the Rule. It so happens that it is the first step specified in the Rule, but the Rule could equally well have provided that process issue first or that notice be given first. Those are all steps in petitioning the court. The language of the statute does not, therefore, support the decisions of the lower courts.

The other authority relied upon by the District Court for this proposition, that jurisdiction of the court in no way depends upon service of process, was a statement in the old limitation of liability case of *In re Morrison*, 147 U. S. 14 (1893):

> "The filing of the libel and petition of the steamship company, with the offer to give a stipulation, conferred jurisdiction upon the court."

The jurisdiction there referred to is the jurisdiction of the res, not of the person. This statement when read out of context and without relation to the issues raised in the case would seem perhaps to be some support for the District Court, but the case did not in any way involve the question of jurisdiction over the person of claimants and involved primarily the question whether the bond given for the value of the vessel could be fixed initially *ex parte*. It was also contended by the appealing claimant in that case that personal service was necessary to bring him into the proceeding. The quotation above, however, did not relate to this second question, but only to the first. With respect to the second question, the Supreme Court ruled:

> "It was not necessary, in order to sustain the proceeding for limiting liability, that Morrison or Vanderbilt should have been personally served with notice thereof within the district of Massachusetts."

The Admiralty rule relating to service at that time required only publication. At page 21 of the opinion it appears that the U. S. Marshal's return revealed that there had been a proper publication of the notice in a newspaper, a proper posting of the notice in a public place, and that in fact the monition was served by registered mail on Mr. Vanderbilt, the owner of the colliding vessel. It further appeared that the U. S. Marshal had mailed a copy of the injunction or restraining order to the attorneys for Mr. Vanderbilt.

Instead of supporting the court's position that constructive service of damage claimants is not a jurisdictional requirement, *In re Morrison* actually supports claimants' position that legal issuance and service of process is necessary to acquire jurisdiction over the persons of prospective damage claimants.

Thus neither of the sources relied upon for the lower court's holding that jurisdiction did not depend upon personal or constructive service support such a conclusion.

RULE 53 NEITHER MODIFIES THE TIME REQUIREMENTS OF RULE 51 NOR DOES IT PROVIDE FOR RETENTION OF JURISDICTION BY THE COURT WHERE RULE 51 WAS NOT COMPLIED WITH

The District Court was still confronted with an unexcused failure of the vessel owner to follow the express requirement of Rule 51 as to publication and mailing and as to the time when process should issue. It sought authority for its action in disregarding Rule 51 and issuing process and permitting service by publication and mailing at a later time after the statute of limitations had run in the language of United States Supreme Court Admiralty Rule

53. The reliance placed by the District Court upon Rule 53 is manifest from the following excerpts from the District Court's opinion:

> "The failure to carry out the requirements of Rule 51 only stays the contest as to liability. See Rule 53, which demonstrates what I believe to be the proper result. It is there stated that the owner shall be at liberty to contest his liability provided he has complied with the requirements of Rule 51. This clearly provides that if he has not complied with that rule, the monition is ineffective and the limitation proceeding will be stayed until a new monition is issued and the notice requirements met" (R. 46).
>
> "It should also be noted that Rule 53 is the only Rule which mentions in any way the effect of a failure to comply with Rule 51. The fact that dismissal is not mentioned is additional reason for holding that the amendments were not meant to deprive the petitioner of its right to limitation if it failed to follow Rule 51" (R. 47).
>
> "The court has the power to allow the issuance of a new monition, notice of monition and notice to claimants. Rule 53, as pointed out above, indicates that corrective steps may be taken if at first petitioner has not followed Rule 51" (R. 47).
>
> "Proceedings to contest limitation only may not go forward until and unless Rule 51 is complied with —see again Rule 53" (R. 48).

But there is no provision in Rule 53 which permits an avoidance of Rule 51. The rule provides:

> "In the proceedings aforesaid, the petitioner (vessel owner) shall be at liberty to contest his liability, or the liability of the said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and pro-

> vided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed;"

This provision of Rule 53 relates not at all to limitation of liability. "Contesting * * * liability or the liability of said vessel" means complete exoneration, as is evidenced by the interchangeable use of the term "exoneration" with the term "contest liability" in the provision above quoted. It is clear that this is the meaning when one examines this same sentence of Rule 53 before its last revision.

> "In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act) provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed."
>
> (The Rule in this form may be found in *Benedict on Admiralty*, 6th Ed., Vol. 3, page 330.)

It is the usual and common practice to include in the claim for relief in a limitation of liability proceeding a claim for complete exoneration. Rule 53 provides that this may be done.*

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*Under English practice from which the American limitation of liability law stemmed, the ship owner must admit liability to avail himself of a limitation of liability proceeding. The only relief to which the vessel owner is entitled in such a proceeding in England is that the liability may be limited; the vessel owner may not claim complete exoneration in the limitation of liability proceedings. *Benedict, Admiralty*, 6th Edition, Section 510. Rule 53 expands the relief available to the vessel owner so as to include complete exoneration.

Except for Rule 53, the vessel owner could not (by virtue of any statute or other rule) present the issue of exoneration in the limitation of liability proceeding. This follows because Sections 183-185, of Title 46 U. S. C., deal only with limitation of liability in a *forum concursus* and say nothing about exoneration from liability and Rule 51 deals exclusively with limitation of liability and does not deal with exoneration, except that in the proposed notice, provision is made for both limitation and exoneration, anticipating that the vessel owner will, of course, want to invoke Rule 53 at the commencement of limitation proceedings.

Rule 53 gives to the vessel owner the extra privilege ("shall be at liberty") of claiming that there is no liability at all, not even up to the limited amount of the value of the vessel, provided he "shall have complied with the requirements of Rule 51," which can mean only that he shall have petitioned for limitation of liability in the time and manner therein provided. There can be no claim for complete exoneration in a *forum concursus* apart from the limitation of liability proceeding.

The District Court and the Court of Appeals not only misconstrued the meaning of the phrase "contest liability and the liability of the vessel" to mean "contest the right *to limit* liability", but also substituted for the words "provided it shall have complied with the requirements of Rule 51," the concept that if the vessel owner has not complied with that Rule, the monition is ineffective and the limitation proceeding *will be stayed until* a new monition is issued and the notice requirements met. Rule 53 says nothing about staying the proceeding. There is not one word in Rule 53 about postponing or staying anything.

Similarly the District Court arrived at the conclusion that Rule 53 "indicates that corrective steps may be taken

if at first petitioner (the vessel owner) has not followed Rule 51." Rule 53 says nothing about what shall or shall not be done if the vessel owner has not followed Rule 51, except that if he has not, he may not then even claim exoneration. It merely permits the vessel owner to claim complete exoneration together with its claim for limitation of liability made under Rule 51.

The District Court also thought it was significant that Rule 53 did not provide that the proceeding for limitation be dismissed if the vessel owner had not complied with Rule 51 (R. 47). It would be strange if it did. The only reference in Rule 53 to Rule 51 is the requirement that in order that the vessel owner may claim complete exoneration, it must have complied with Rule 51, i. e., must have pending a properly instituted limitation of liability proceeding. There could be no reason for including in Rule 53, which permits the additional alternative relief of exoneration in the limitation of liability proceeding, a penalty for not having asked for the additional optional relief. This provision of Rule 53 does not deal with the limitation of liability portion of the proceeding.

Again the Court said:

> "proceedings to contest limitation only may not go forward until and unless Rule 51 is complied with. See again Rule 53" (R. 48).

Claimants are unable to understand how the court could in any event place such a meaning, i. e., "until" on the word "provided" in Rule 53, particularly, when it is used in said Rule in the past perfect tense, "provided he *shall have* complied with the requirements of Rule 51." This construction of the lower court permits a vessel owner to merely file its petition within the six months period and give notice to claimants any time thereafter that it shall

choose. It makes the express provisions of Rule 51, relating to the time of sending notice, the time of publication, and the time of issuance of the monition, complete nullities.

Damage claimants contend that Rule 53 has no bearing on the question of when the requirements of Rule 51 must be complied with and that it is only by reference to Rule 51 itself that questions of time can be determined.

FAR-REACHING CONSEQUENCES OF LOWER COURTS' DECISIONS

The effect of the lower courts' decisions as a precedent in other limitation of liability proceedings is the principal consideration which should move this Court to grant review. The opinion of the District Court has been printed in *1950 American Marine Cases* 1499 which is closely followed by all lawyers in the admiralty field. The affirmance by the Court of Appeals will likewise be reported therein. The decisions have likewise been printed in 93 F. Supp. 549, and 185 Fed. 1019. Those two decisions have permitted the vessel owner to ignore the express provision of Rule 51, and nevertheless be permitted to have new process after the statute of limitations has run and to serve the process at any time before trial although there is no provision therefor, either in rule or statute. Rule 51 requires one thing—namely, that notice by mail be sent by the vessel owner to claimants "not later than the day of second publication"—; the vessel owner did not do this. This notice by mail is the important part of the constructive service scheme established by Rule 51. This Court recently held in *Mullane v. Trust Co.*, 339 U. S. 306 (1950) that a method of constructive service which did not include mailed notice where practicable (as it was in

the instant case) did not meet the requirement of due process. The failure to mail under the first writ of monition therefore makes that writ a nullity. The decision appealed from holds that any time after the statute of limitations has run a new writ may be issued to the vessel owner as a matter of right; that notice by mail may be sent at any time before trial on the merits; that a failure to send such notice may be corrected at any time and that the vessel owner as a matter of right may disregard all time provisions of Rule 51 so long as he shall have filed a petition within six months period provided for by Section 185.

Rule 51 becomes meaningless. The six month statute of limitations becomes meaningless. The vessel owner determines his own statute of limitations by getting process and serving it when it chooses.

CONCLUSION

The judgment of the District Court, affirmed by the Court of Appeals, sanctions the issuance of process and constructive service thereof by mailing notices to claimants at any time before trial in direct disregard of United States Supreme Court Admiralty Rule 51, which requires the issuance of process "upon" filing the security and service of the notice "not later than the day of second publication," and thereby sets up its own time method for constructive service and also circumvents the six month statute of limitations of 46 U. S. C., Sec. 185.

Therefore, this petition for writ of certiorari should be granted.

Respectfully submitted,

ELMER H. GROEFSEMA,
4045 Penobscot Building,
Detroit 26, Michigan;

KENNETH C. DAVIES,
2756 Penobscot Building,
Detroit 26, Michigan;

CARL A. SCHIPFER,
For McKeehan, Merrick,
Arter & Stewart,
2800 Terminal Building,
Cleveland 13, Ohio;

VICTOR M. TODIA,
1350 Terminal Tower,
Cleveland 13, Ohio;

J. HAROLD TRAVERSE,
1350 Terminal Tower,
Cleveland 13, Ohio,
Counsel for Petitioners.

APPENDIX

45 U. S. C., Sec. 185:

"Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. (As amended June 5, 1936, c. 521, Sec. 3, 49 Stat. 1480.)"

Rule 51. *Limitation of Liability—How Claimed.*—The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code [10 F.C.A., Title 46, §§183 to 189]) as now or

hereafter amended or supplemented, may file a petition in the proper District Court of the United States as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six per cent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage,

etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may

direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

United States District Court
District of

Notice of Petition for Exoneration from or Limitation of Liability

(Filed.....)

Notice is given that.....has filed a petition pursuant to Title 46, U. S. Code §§183-189 [10 F. C. A., Title 46, §§183 to 189] claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the vessel..... from.....to.....terminating on.....

All persons having such claims must file them, under oath as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U. S. Court House at.....and serve on or mail to the petitioner's proctors..... .....at.....a copy on or before..... or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

.....
U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of

such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said Court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding. (As amended June 21, 1948.)

Rule 53. *Rights of Owner to Contest Liability and of Claimants to Contest Exoneration From Liability or Limitation of Liability of Owner.*—In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied. (As amended June 21, 1948.)

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In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 601.

ROBERT ADAMSON, *et al.*,
Prospective Claimants Appearing Specially,
Petitioners,

vs.

CANADA STEAMSHIP LINES, LIMITED,
Respondent.

BRIEF OF RESPONDENT

In Opposition To Petition For Writ of Certiorari.

STATEMENT OF CASE.

The Summary of Matter Involved, contained in the Petition for Writ of Certiorari, is not complete. We believe that certain additional facts should be brought to the attention of this Court.

The Noronic fire occurred on September 17, 1949. The petition for exoneration from or limitation of its liability was filed by the owner in the United States District Court for the Northern District of Ohio, on November 25, 1949 (R. 2-10). On that date appraisers were appointed by the Court to appraise the value of petitioner's interest in the Noronic immediately after the fire, and pending freight, if any. On November 30, 1949, the petitioner filed the return of the appraisers and also a bond in the amount of $448,-449.40, which bond was approved by the Court (R. 10-12). On the same date the order for monition and injunction was signed, a commissioner to receive claims was appointed and the claimants were given until April 3, 1950 (since extended to July 2, 1951) to file their claims and answers

(R. 12-16). The Court's order required the publication of the notice of monition once a week from November 30, 1949 until April 3, 1950 in eleven newspapers of general circulation in the Middle West and Canada (R. 17). Publication of the notice in the above mentioned newspapers was accomplished within the time limit specified in the Court's order.

The notice of monition (R. 16), while not in the exact form set forth in Supreme Court Admiralty Rule 51, as amended, was substantially the same. It gave notice that the petition for exoneration from or limitation of liability had been filed in the United States District Court at Cleveland. It warned all persons claiming loss, destruction, damage or injury arising out of the Noronic fire that they must file their claims with the Commissioner and their answers with the Court, within a specified time (R. 16). In connection with this monition and the notice of monition the District Court said (R. 43):

> "* * * the monition did not direct persons asserting claims to file their claims with the Clerk of Court, and to mail a copy of each claim to the proctor for the petitioner; but it did direct the claimants to file claims with this Court through a Commissioner, where by Rule 52, they eventually are to be proved (third paragraph Rule 52); (2) the notice of the monition published in the newspapers was not in the same form as the notice found in Rule 51, *but it is substantially the same and that is all that is required.*" (Emphasis supplied.)

In addition to the notice published in the above mentioned newspapers, letters were sent from the office of proctors for the petitioner to approximately 106 claimants giving them information as to the pendency of the limitation proceedings and advising them concerning the necessity of filing their claims and answers (R. 38-39). Also between February 13th and 17th, 1950, the Chief Clerk of Canada Steamship Lines, Limited, mailed copies of the notice of monition *to all persons who had filed claims with the Company* (R. 40).

In obedience to the monition issued November 30, 1949, approximately one hundred sixty-nine claims were filed with the Commissioner and they have been forwarded by him to the Clerk and filed in these proceedings.

On April 3, 1950 (the return day of the original monition) the petitioners herein entered their special appearances and filed their exceptions. On June 7, 1950, the District Court filed its memorandum opinion (R. 42-49). The Court stated in the opinion that Title 46 U. S. C. Section 185, as amended, contained clear and express provisions relating to the reposing of complete and exclusive jurisdiction in the admiralty court and "that once attaching, no subsequent procedural irregularity would be fatal to that jurisdiction" (R. 44). The Court further ruled that jurisdiction in limitation of liability proceedings does not depend upon personal or constructive service; that the notice of monition is not the service of process in the civil sense but is a constructive notice or warning to all potential claimants of the pendency and conclusive character of the proceedings (R. 44). The Court concluded that the purpose of the amendments of Rule 51 (June 21, 1948) was to prevent defaults because of failure to file claims and that the requirements of that Rule were procedural and not jurisdictional (R. 44).

Having concluded that the jurisdiction conferred by the filing of the petition and the bond in conformance with the requirements of 46 U. S. C. 185, as amended, was not ousted by the subsequent procedural irregularities the District Court ruled that it had the power to order the correction of those irregularities (R. 47). In order that full compliance with the requirements would be had, the Court ordered the issuance of a new monition and notice. It also ordered that this notice be published for four consecutive weeks in the newspapers specified in the order and that prior to the date of second publication copies of the notice should be mailed to all claimants of whom the petitioner

had knowledge, and that in addition thereto those representing estates of decedents should be sent a copy of Supreme Court Admiralty Rule 52 (R. 50-53). The publication was accomplished (R. 53). Copies of the notice of monition were mailed to all known claimants and prospective claimants and copies of Rule 52 went to decedents at their last known addresses and also to the person known to have made any claim on account of such deaths (R. 56-58).

The Court ordered the Commissioner to transmit all claims filed with him to the Clerk, and that claims not already filed should be filed with the Clerk (R. 49). The vessel owner was ordered to compensate the Commissioner for his services and this has been accomplished. On June 8, 1950, an order overruling the exceptions was entered (R. 49).

On September 14, 1950, pursuant to leave granted by the District Court, an action at law was filed on behalf of the death claimants represented by opposing counsel, in order to comply with the one year limitation provision of Fatal Accidents and Trustee Acts of Ontario, it being specified that no further action would be taken in the suit at law, until final determination of the appeal had been had.

On December 14, 1950 the Court below adopted the opinion of the District Court and affirmed the orders of that Court overruling the exceptions to the jurisdiction (R. 79). On February 2, 1951, the petition for rehearing was denied, without opinion (R. 91).

COUNTER-STATEMENT OF QUESTION PRESENTED.

Does the District Court have sole jurisdiction over all of the claims arising out of this disaster with the power to order the correction, after the expiration of the six months limitation period provided for in 46 U. S. C. 185, of the procedural irregularities arising out of the vessel owner's failure to comply literally with the requirements of Supreme Court Admiralty Rule 51?

ARGUMENT.

Point I.

The decisions below are in strict conformance with the uniform rulings of this Court that the jurisdiction of the admiralty court, in limitation of liability proceeding, once attaching, is not ousted by subsequent procedural irregularities.

The basic statute here involved, is 46 U. S. C. 185. As amended in June 1936, the statute reads as follows:

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court, his interest in the vessel and freight, together with such sums or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. *Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.*" (Emphasis supplied.)

It is undisputed that the vessel owner herein, within three months after the date of the disaster, filed its petition for exoneration from or limitation of liability in a court of competent jurisdiction and that within the same period it filed a bond, with approved surety, and filed the return of the appraisers.

The language of the above statute is clear and explicit. It states, in unmistakable terms, that when the petition has

been filed and the bond furnished "all claims and proceedings against the owner with respect to the matter in question *shall cease.*" Under the authority of the statute, the District Court, upon compliance with the statutory requirements and without waiting for the completion of the procedural requirements specified by the Admiralty Rules, had the jurisdictional power, and, in this case, exercised that power to stay the proceedings pending in all other courts and enjoin the bringing of subsequent actions. The legislative pronouncement that, upon the filing of the petition and the bond, all claims and proceedings against the vessel owner *shall cease*, is the vesting of sole and exclusive jurisdiction in the District Court as of the time when those two requirements have been met.

This Court in *Hartford Accident Co. v. Southern Pacific Co.*, 273 U. S. 207 ruled that the jurisdiction of the admiralty court became fixed as of the time the bond was put into its custody and that that court possessed exclusive power to adjudicate all phases of the controversy. In that connection the Court said (p. 217):

> "* * * The jurisdiction of the admiralty court attaches in rem and in personam by reason of the custody of the res put by the petitioner into its hands. * * *"

This Court has also ruled that the jurisdiction which attaches by reason of the filing of the petition and the furnishing of the bond is not taken away by any subsequent procedural irregularity. In *In Re Morrison, Petitioner*, 147 U. S. 14, a collision occurred between two vessels in Vineyard Sound. On of the vessels sank and the owner of the other filed its petition for limitation of liability in the District Court of Massachusetts. The value of the owner's interest was appraised and a stipulation for that amount was given. A monition was issued and notice of monition was published, but was not personally served in the Massachusetts district upon the owner of the sunken vessel. The usual injunction was then issued. Subsequent to this the

master of the sunken vessel filed a petition for damages and limitation of liability in the District Court for the Southern District of New York. In that suit affirmative relief was sought and process was issued and the other vessel was attached. The owner of the other vessel then appeared in the New York court and secured, after a hearing, an order dismissing the libel, setting aside the service of process and releasing the vessel from attachment. The New York court granted this relief on the ground that the Massachusetts court had full jurisdiction of the cause. The cause came to this Court on a petition for a writ of mandamus and for a writ of prohibition. This Court stated that the only question before it was the jurisdiction of the District Court of Massachusetts. In sustaining the jurisdiction of that Court this Court said (p. 34):

> "The filing of the libel and petition of the steamship company with the offer to give a stipulation conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction."

The petitioners herein seek to escape the binding force of this ruling by contending (Br. p. 14) that the case did not involve the question of jurisdiction over the persons of the claimants. The following language of the opinion belies that contention (pp. 31, 32):

> "It is also contended that the court in Massachusetts was not competent to adjudicate the question whether or not the collision was caused by fault on the part of the Dimock *because it did not acquire personal jurisdiction of one or more of the damage claimants or jurisdiction in rem of the Dimock.*" (Emphasis supplied.)

In light of this language it cannot be soundly contended that lack of personal jurisdiction over the damage claimants was not asserted as one of the reasons why the Massachusetts court lacked jurisdiction and when this Court ruled that procedural irregularities, subsequent to the filing of

the petition and bond, could not take away the jurisdiction which had become fixed, it is reasonable to conclude that this Court was referring to *all* of the irregularities which were there urged as jurisdictional defects.

Reduced to its essentials, the instant controversy involves a situation where counsel for the vessel owner prepared the pleadings and took procedural steps in erroneous reliance upon the Rules prior to the 1948 amendments. Literal and absolute compliance with the requirements of Rule 51, as amended, was had as of June 19, 1950 (approximately nine months ago). All of the suggested irregularities related to bringing notice of the pending proceedings home to the various claimants and their counsel. All of the claims and answers have not been filed and need not be filed until July 2, 1951. The limitation proceedings cannot be reached for trial until January or February 1952 and if the matter here in controversy ends prior to the above mentioned date, the issues of the case can be joined and all parties will have adequate time to prepare for trial.

The action taken by the trial court in permitting the correction of the procedural irregularities has had the effect of protecting the vessel owner against the mistakes made by its counsel, without adversely affecting the rights or interest of the claimants. The claimants are still accorded the right to file their claims and to contest the right of the vessel owner to exoneration from or limitation of its liability. All of the rights which are afforded to the claimants, within the framework of the limitation of liability statutes, are still available to them, without diminution in any respect. They are entitled to their day in court and this they will receive. The admiralty court has the full power to accord them all of their rights and to adequately protect their interests. They are entitled to no more.

The action taken by the District Court and approved by the Court below was in conformance with the broad power, inherent in an admiralty court, to administer equity. In

describing that principle, *Benedict on Admiralty*, Vol. 2, 6th Ed., page 30, says:

> "The court is bound to determine the cases submitted to its cognizance, upon equitable principles and according to the rules of natural justice. This principle of the maritime law pervades the whole practice of the admiralty in the United States. The grand object of doing justice between the parties is superior to technical rules and forms and where the stricter practice of the common law, or the civil law, might have turned a party out of court, or defeated or perverted justice by considering an arbitrary rule of procedure as paramount to all other considerations, the American admiralty has found, in the educated reason and cultivated discretion of the court, the means of defeating chicanery, rectifying mistakes, supplying deficiencies, and suggesting to the party the means of reconstructing his case, if necessary, without the loss of such real progress as he may have already made."

This Court, in the recent case of *Black Diamond Steamship Corp. v. Robert Stewart & Sons et al.*, 336 U. S. 386 pointed out the desirability of the exercise of the admiralty court's equitable powers to correct defects and prevent the miscarriage of justice. In that case, where the courts below had dismissed the petition for limitation of liability because the vessel owner had failed to furnish a bond in the amount of the value of the vessel, this Court reversed and directed that the petition be reinstated. In so doing the Court said (p. 395):

> "• • • And perhaps it is well to add, in passing, that, in view of the six month limitation on proceeding, under that statute, remand to the District Court in order to give Black Diamond an opportunity to file a larger bond would have been a better course, since the defect was not jurisdictional, than affirmance of dismissal of the petition. • • •"

In the above case there was an admitted failure to have complied with the requirements of 46 U. S. C. 185

relating to the amount of the bond. Both of the lower courts felt that this was a defect which required dismissal of the petition. This Court was of the view that the defect was not jurisdictional and that even after the expiration of the six months period, the petitioner should be permitted to comply with the statutory requirement. The bond is the principal source of protection for the damage claimants and if a failure in that regard is not a jurisdictional defect and may be subsequently rectified, the District Court, in the case at bar, most assuredly had the discretionary power to permit the correction of procedural irregularities, where matters relating to the monition and notice of monition are involved and where the correction can be accomplished well in advance of trial and without adversely affecting the interests of any of the parties.

The decisions below are correct. They are in conformance with the principles announced and reaffirmed by this Court and they should not be disturbed.

Point II.

The decisions below are not in conflict with decisions of this Court or decisions of other Circuit Courts of Appeals.

Petitioner's contention that there is a conflict between the decisions below and the case of *Mullane, Special Guardian, v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, is not sound. In the above case the appeal was from a judgment of the Court of Appeals of New York, affirming a decree in favor of a trust company in proceedings concerning judicial settlement of its trust accounts, in which notice was only given by newspaper publication. The effect of the decree was, in the language of the lower court, to settle "all questions respecting the management of the common fund" and this Court, in that connection said (p. 311):

"* * * We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree."

It is thus apparent that there is a basic distinction between the situation in the above case and the one at bar. In the former the judgment was attacked by persons who had not received notice by mail of the pendency of proceedings and whose rights were being irrevocably determined by the judgment, without them being afforded their day in court. In the latter no judgment is involved, the case is still in the pleadings state, no rights have been settled and all of the claimants, including these petitioners, will be given their full day in court. The exceptions here involved were made at the outset of this litigation, before the issues on the merits have been determined, before any testimony has been taken and certainly before any trial has been had.

The fundamental right which this Court said was not afforded in the *Mullane* case, was the right to be heard. In referring to that primary requirement of due process, the Court said (p. 314):

> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard,' *Grannis v. Ordean*, 234 U. S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The Courts below, in the instant case, did not rule that the notices required by Rule 51 could be dispensed with. The District Court, on the contrary, ordered that there be complete and literal compliance with the requirements of

that Rule. The claimants in this case, as distinguished from the beneficiaries in the *Mullane* case, have received notice of the pendency of the proceedings so that they can choose "whether to appear or default, acquiesce, or contest."

There is, we respectfully urge, a distinction between the notice of monition required in limitation of liability proceedings and the process by means of which common law courts secure jurisdiction over the person of the defendant. In the limitation proceedings the court has jurisdiction and control over the entire controversy and the monition is notice that the claims against the vessel owner or the *res* must be asserted and established if affirmative relief is to be secured. The notice of monition is not, therefore, a writ used to secure jurisdiction over the person of a party who is defending against a claim which is being asserted against him, but is a citation inviting persons to assert their claims in a proceeding over which the court already has jurisdiction. On the other hand, in a civil suit at law, jurisdiction over the person of the party defendant is a condition precedent to the jurisdiction of the court to try the controversy between the parties, and service of summons is the means by which that jurisdiction is secured. That jurisdiction of the admiralty court in limitation of liability proceedings, secured by having control over the *res*, must attach *before* the monition issues is the ruling of this Court in *Ex Parte Slayton*, 105 U. S. 451, 452.

The asserted conflict between the decisions below and *Linn & Lane Timber Co. v. United States*, 236 U. S. 574 does not exist. In the *Linn* case this Court ruled that when reasonable diligence is shown in securing service, the filing of the bill interrupts the running of the limitation statute. See *United States v. Spreckels*, 50 F. Supp. 789, 790 (D. C. N. D. Cal.).

It cannot be reasonably disputed in the instant case, that due diligence and good faith were shown in comply-

ing with the requirements of Rule 51, after the mistake was discovered. An additional reason why no conflict exists is that there is a basic distinction between the limitation period contained in 46 U. S. C. 185 and the ordinary statutes of limitation which bar an action if it is not commenced within the specified period.

Under federal law the filing of the complaint constitutes the commencement of the action which tolls the statutes of limitations and service of process may be subsequently accomplished.

See:

Isaaks v. Jeffers, 144 F. 2d 26 (CCA 10) cert. denied 323 U. S. 781;
Bomar v. Keyes, 162 F. 2d 136 (CCA 2);
Gallagher v. Carroll, 27 F. Supp. 568 (E. D. N. Y.).

In admiralty the proceeding is considered commenced when the libel is filed and not when process is served.

See:

2 *Benedict on Admiralty,* 6th Edition, p. 313;
Laidlaw v. Oregon Ry. Co. & Nav. Co., 81 Fed. 876, 880 (C. C. A. 9);
Ore Shipping Corp. v. D/S A/S Hassel, 137 F. (2d) 326 (C. C. A. 2);
Batkiewicz v. Seas Shipping Co., Inc., 54 F. Supp. 789 (S. D. N. Y.).

The case of *United States v. American Lumber Co.,* 85 F. 827, cited by petitioners (Petition, p. 10) is distinguishable. The facts in that case disclose that the reason for the ruling was that the only process which had been issued was of a character that had no effect beyond the jurisdiction of the court. The defendants in that case were never within the jurisdiction of the court during the pendency of the case so they could not be served and the proceeding was a nullity.

Point III.

The decisions below do not raise important questions of federal law involving the construction of Admiralty Rule 51 and the procedure required thereunder.

The decisions below do not authorize a variation from the requirements of Rule 51. They are, on the contrary, an affirmation of the principle that those requirements must be explicitly followed. Even though those decisions have come to the attention of the admiralty bar, through the medium of the American Maritime Cases and the Federal Reporter there is no soundness to petitioner's contention that they will be an invitation to vessel owners to procrastinate or that the procedure, under Rule 51, will vary in the several district courts. The District Court, in the instant case, in mentioning the deterrents which exist against the inclination to delay, said (R. 48):

> "It might also be claimed that this ruling will lead to defective procedure whenever the petitioner wishes to delay. The additional cost petitioner must bear and the threat of dismissal if the petitioner refuses to correct the defective procedure upon court order would seem sufficient to prevent any such abuse."

The decisions below, it seems to us, will bring specifically to the attention of admiralty practitioners the requirements of the 1948 Amendments and will serve as a warning that literal compliance with the Rules is necessary. If the courts below had ruled that the requirements of those Rules could be dispensed with, then an issue might exist which would require authoritative determination by this Court. The issues here involved are, however, ones which relate to the correction of a mistake on the part of one vessel owner, in one district court, and the intervention of this Court is not required to maintain the uniform construction and application of its Admiralty Rules.

The requirements of Rule 51 are clear and explicit. We venture to suggest that by reason of the publicity which

has been given the mistake of counsel for this vessel owner in this case, the problem is not likely to arise again in limitation of liability proceedings. Rather than creating lack of uniformity in the application and construction of the Rules, the decision below should tend to have the opposite effect. No other admiralty practitioners could possibly construe these decisions as approving a departure from the requirements of the above mentioned Rule.

The courts below concluded that the purpose of the 1948 Amendments was to prevent the default of prospective claimants. It was found that under the procedure prior to the Amendments, claimants who lived some distance from the place where the limitation of liability proceedings were pending were being foreclosed because of failure to file claims due to lack of notice of the proceedings and to lack of proper legal advice. It was, we respectfully urge, the desire of this Court, in promulgating the Amendments, to assure that all parties would be given their day in court, their opportunity to be heard. The changes as to the form of and mailing of the notices, the simplifying of the requirements as to the filing of the claims and answers and the additional requirement that copies of Rule 52 shall be sent to death claimants are all designed to accomplish that underlying purpose and all are matters of procedure and practice in courts which are already vested with the required jurisdictional power.

In the instant case the purpose of the Amendments has been completely fulfilled. All possible claimants have been notified of these proceedings, and their counsel have been advised as to their rights and duties. No sound reason has been advanced why this phase of the litigation should not now end and the parties proceed to a trial of the case on its merits.

The decisions below do not, as petitioners contend, render meaningless the six months limitation period provided for in 46 U. S. C. 185, as amended. That statute pro-

vides that the filing of the petition and either the furnishing of the bond or the transfer of the owner's interest to a trustee, must be accomplished within six months from the time the first claim is made. Prior to the 1936 Amendment of the above statute there was no time limit within which the vessel owner was required to file his petition and bond. Prior to that time he could litigate with damage claimants in various courts over a period of years and even after final judgment had gone against him, might still file his petition for limitation of liability. It was in recognition of this practice and the Congressional desire to avoid the expense and delay which such a practice necessarily involved that the six months limitation period was inserted. Its purpose was to require the vessel owner to act promptly in asserting the right to limit his liability. In the case at bar the requirements of the statute were accomplished in approximately three months after the first claim was made against this respondent. It cannot, therefore, be reasonably urged that the vessel owner, here involved, was attempting to delay the orderly progress of the proceedings.

There is nothing in Admiralty Rules 51, 52 and 53 which even suggests that the six months limitation period is applicable to them. Had this Court intended that the limitation period apply to the above mentioned Rules, such an intention would have appeared, expressly, in the Rules themselves.

In the proceedings herein in the District Court, the petitioner receded from their contention that all proceedings under Section 185 and the Admiralty Rules must be accomplished within six months (R. 43). Such a concession was necessarily required. Inasmuch as the statute gives the vessel owner six months within which the petition and the bond may be filed it will have to be admitted that this respondent could have waited until the day prior to the expiration of the limitation period to file the petition and bond and, if that had been done, it would have been

physically impossible to have complied with the requirements of the Admiralty Rules, within the six months period. In recognition of the soundness of this proposition the petitioners are forced to urge that the only additional steps that must be accomplished within the six months period are the issuance of a valid monition with proper service on prospective claimants, or the correction of the defective monition. This is completely illogical for, if the express provisions of Section 185 are controlling, nothing beyond the filing of the petition and the bond must be done within six months, and, if the requirements of the Admiralty Rules must be interpreted in the light of Section 185, all of those requirements and not just the ones relating to the issuance and service of the monition, must be obeyed prior to expiration of the six months period.

The cases of *Petition of Goulandris*, 140 F. (2d) 780 (C. C. A. 2) and *The Chickie*, 141 F. (2d) 80 (C. C. A. 3) cited by petitioners, do not hold to the contrary. In the *Goulandris* case the Court ruled that where the petition alone is filed within the six months period the defect is jurisdictional and the petition should be dismissed. Neither in that case, nor in the *Chickie* case, did the courts have before them the issues as to whether the filing of the petition and the bond would have constituted compliance with the statute. In the latter case "all the owners did was file their petition. There was no transfer of a *res* to a trustee; no monition ever issued; the required fee was not even paid" (p. 84). The proceedings in that case were properly declared to be a nullity.

There is language in the *Goulandris* opinion which supports the decisions below in the instant case. In affirming the order of dismissal the Court of Appeals for the Second Circuit said (p. 782):

> "* * * Had the appellants accompanied their petition with an *ad interim* stipulation and prayer for an order approving it, or if within the six months period they

had sought to obtain an order for due appraisement of their vessel and her pending freight, it may well be that they would have complied with the statute, although the court's order and the actual furnishing of the limitation fund occurred after expiration of that period. This precise question is not before us and need not be now decided. All we decide is that the petition as filed, with nothing further done within the six months, did not satisfy the statutory requirement. We think the appellees are correct in urging that in reality what the petitioners did amounted to no more than filing with the court a notice of their intention at some future time to initiate a proceeding for limitation of liability."

We do not contend, nor did the Courts below rule, that the filing of a petition, alone, is sufficient to confer jurisdiction, for the statute, itself, declares otherwise. In ruling, however, that such jurisdiction was conferred by the filing of the petition and the bond, within the six months period, the decisions below are sound and not at variance with the decisions of any other circuit.

It is difficult to appreciate the significance of petitioner's contention that the filing of a bond is not a controlling requirement in conferring jurisdiction in view of the explicit language of the statute to the contrary. The fact that in cases where the vessel is a total loss no bond is filed nor transfer of the vessel owner's interest is accomplished is not important because in those cases the admiralty court must still be satisfied, through its appraisers, that no *res* exists and where deaths or personal injuries have resulted the owner is required, upon the order of the court, to create a limitation fund, representing sixty dollars per registered ton.

There is, as we view it, no analogy between the issues presented for determination in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 and those in the instant case. In the above case the courts below had reached contrary conclusions regarding the issue, in diversity of

citizenship cases, as to whether the Federal Rules of Civil Procedure or the local law was controlling on the question of the tolling of the statutes of limitations. It was necessary to have that conflict resolved and to determine whether the principle of *Erie R. Co. v. Thompkins* was or was not applicable, in order for litigants to be authoritatively appraised as to their rights. In the case at bar there is no dispute as to whether one body of law is or is not applicable. The statutes and the Admiralty Rules relating to limitation of liability do not now require interpretation and there is no conflict of authorities with respect to them.

This Court has often stated that its certiorari powers should be sparingly exercised. In *Layne & Bowler Corp. v. Western Well Works Inc.*, 261 U. S. 387, 393, the Court said:

> "* * * the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

The petition in the instant case should be denied for the same reasons.

Point IV.

The Courts below have not misconstrued the purpose and function of Admiralty Rule 53.

After having concluded that sole and exclusive jurisdiction of the entire controversy had been conferred by the filing of the petition and the bond and that the procedural irregularities were subject to correction, the District Court had the following to say in respect to Admiralty Rule 53 (R. pp. 46-47):

> "The failure to carry out the requirements of Rule 51 only stays the contest as to liability. See Rule 53,

which demonstrates what I believe to be the proper result. It is there stated that the owner shall be at liberty to contest his liability provided he has complied with the requirements of Rule 51. This clearly provides that if he has not complied with that Rule, the monition is ineffective and the limitation proceeding will be stayed until a new monition is issued and the notice requirements met."

"It should also be noted that Rule 53 is the only rule which mentions in any way the effect of a failure to comply with Rule 51. The fact that dismissal is not mentioned is additional reason for holding that the amendments were not meant to deprive the petitioner of its right to limitation if it failed to follow Rule 51."

The above language does not amount to a construction, as petitioners contend, that Rule 53 governs and controls the right to limit as distinguished from the right to contest liability. Although Rule 53 states, affirmatively, that a vessel owner shall be at liberty to contest his liability provided he shall have complied with the requirements of Rule 51, it is clear that the right to contest liability shall not be available until those requirements have been met. The Courts below did not interpret Rule 53 as changing or modifying the requirements of Rule 51, in any way. The rights to exoneration from or limitation of liability are claimed in a single petition filed at the outset of the proceedings by the vessel owner and the trial of both issues occurs at the same time. Although Rule 53 does not encroach on the requirements of Rule 51 by making compliance with those requirements a condition precedent to the right to limit liability Rule 53 does operate to hold the entire proceedings in abeyance until those requirements have been met. Rule 53, as the Courts below stated, contains the only penalty which is expressly imposed for the failure to comply with the requirements of Rule 51. The fact that a penalty of dismissal is omitted from the only Rule which refers to the subject at all is an implied recogni-

tion that the failure to comply with Rule 51 is not a jurisdictional defect.

Although, in light of the conclusions already reached, the District Court's observations concerning Rule 53 were only supplementary, they are, we respectfully urge, logical and sound.

CONCLUSION.

The decisions below are correct. They are not in conflict with its decisions of this Court or of other Circuit Courts of Appeal. They have been decided in conformance with the uniform decisions of this Court relating to the jurisdiction of the admiralty courts in limitation of liability proceedings. The statute and rules involved are explicit and the controversy which arises out of procedural defects, that have been corrected, is one which is only important to the parties concerned. No sound reason for the granting of the petition for a writ of certiorari has been asserted and the petition, we submit, should be denied.

Respectfully submitted,

LUCIAN Y. RAY,
ROBT. G. MCCREARY,
LEE C. HINSLEA,
Attorneys for Respondent.

LECKIE MCCREARY SCHLITZ HINSLEA & PETERSILGE,
1970 Union Commerce Bldg.,
Cleveland 14, Ohio,
Of Counsel.